Office - Supreme Court, U.S.
FILED
SEP 7 1982
ALEXANDER L. STEVAS,
CLERK

No. 81-2101

In The
Supreme Court of the United States

October Term, 1981

PENNHURST STATE SCHOOL AND HOSPITAL, et al.,

Petitioners

v.

TERRI LEE HALDERMAN, et al., PENNSYLVANIA ASSOCIATION FOR RETARDED CITIZENS, et al., AND UNITED STATES OF AMERICA,

Respondents

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

JOINT APPENDIX

H. BARTOW FARR, III
Onek, Klein & Farr
2550 M Street, N.W.
Washington, DC 20037
(202) 775-0184
Counsel of Record for Petitioners

DAVID FERLEGER
37 S. 20th Street
Suite 601
Philadelphia, PA 19103
(215) 567-2828
Counsel of Record for Respondent Halderman, et al.

THOMAS K. GILHOOL
Public Interest Law Center of Philadelphia
1315 Walnut Street, Suite 1632
Philadelphia, PA 19107
(215) 735-7200
Counsel of Record for Respondents PARC, et al.

REX E. LEE
Solicitor General
Department of Justice
10th and Constitution Ave., N.W.
Washington, DC 20530
(202) 633-2217
Counsel of Record for Respondent United States of America

TABLE OF CONTENTS

	Page
Relevant Docket Entries	1a
Memorandum and Order, United States District Court for the Middle District of Pennsylvania, March 17, 1978	8a
Order, United States District Court for the Middle District of Pennsylvania, April 24, 1980	34a
Order, United States District Court for the Middle District of Pennsylvania, May 28, 1980	150a
Memorandum and Order, United States District Court for the Middle District of Pennsylvania, April 1, 1982	158a
Memorandum and Orders, United States District Court for the Middle District of Pennsylvania, August 12, 1982	163a

DOCKET ENTRIES

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

DATE	PROCEEDINGS
1974	
May 30	Complaint filed.
July 12	Defendants' Motion to Dismiss and Memorandum of Law in Support thereof, filed.
July 29	Amended Complaint, filed.
August 12	Defendants' Supplemental Motion to Dismiss, Notice of Intention to Reinstate Motion to Dismiss and to Assert Additional Grounds for Dismissal, with Memorandum in Support thereof, filed.
Nov. 25	Motion to Intervene of the United States of America, Memorandum of Law in Support thereof (for leave to intervene as plaintiff), filed.
1975	
Jan. 17	Order, that the Motion of the United States of America to Intervene as a party plaintiff is

	GRANTED, filed.
June 3	Motion of Pennsylvania Association for Retarded Children, et al. to intervene as parties-plaintiffs filed.
Nov. 13	Order, dated 11/12/75, that the motion of Pennsylvania Retarded Citizens, et al., to intervene as party plaintiffs is Granted, etc., filed.
1976	
Nov. 30	Plaintiffs' Second Amended Complaint filed
Dec. 27	Answer of Commonwealth defendants to Second Amended Complaint, filed
1977	
April 18	Civil Non-Jury Trial, witnesses sworn.
Dec. 23	Opinion and Order. Broderick, J. that the Court having found that the constitutional and statutory rights of the retarded residents at Pennhurst have been violated, a hearing is set for 1/6/78 at 9:00 a.m. in Courtroom 10/B for the

	purpose of determining the appropriate relief to be granted, filed.
1978	
March 17	Memorandum Broderick, J. & order that judgment is entered in favor of plaintif and against defendants and granting injunctive relief, etc., filed.
1980	
Jan. 27	Certified copy of order of United States Court of Appeals that the judgment of the District Court filed March 17, 1978 is hereby affirmed with the exception of the order to find alternative employment for all Pennhurst employees, the order directing the eventual closing of Pennhurst and the order banning all future admissions to Pennhurst and the cause is remanded for further proceedings all parties to bear their own costs, filed.
April 24	Order that this Court's orders of March 17, 1978, March 5, 1979, April 26, 1979 and June 8, 1979 are amended, the Commonwealth

	and county defendants, etc. are permanently enjoined to provide suitable community living arrangements for the retarded residents of Pennhurst, et al., etc., filed.
May 29	Order that the order of this Court dated April 24, 1980 in connection with "individual determinations" Paragraph 8 is amended, etc., filed.
1982	
March 23	Certified copy of Order United States Court of Appeals that the judgment of the Court en banc filed December 13, 1979 is hereby reinstated and the judgment of the district court filed March 17, 1978 is hereby affirmed with the exception of the order to find alternative employment for all Pennhurst employees, the order directing the eventual closing of Pennhurst, and the order banning all future admissions to the district court for further proceedings consistent with the opinions of this

	court, all parties shall bear their own costs, file.
April 1	Memorandum and Order that the words "plan, organize, direct, supervise and" contained in Section I, Paragraph 5, Page 3 Lines 1-2 of this Court's Order of April 24, 1980, are deleted Section i, Paragraph 6 of this Court's Order of April 24, 1980 is deleted, filed.
Aug. 12	Memorandum and Order that the Special Master shall submit to this Court by August 30, 1982 a plan for the phasing out and closing of the Office of Special Master by December 31, 1982, filed.
Aug. 12	Order that the defendants shall submit to this Court by September 15, 1982 their plans to provide community living arrangements together with all services required by the retarded person's individual habilitation plan for Pennhurst plaintiff class members (not covered by the school-age order) in the Southeast Region of Pennsylvania (Bucks,

	Chester, Delaware, Montgomery & Phila. Counties) during period commencing October 1, 1982 and closing June 30, 1984, etc., it is further ordered that a hearing shall be held on September 22, 1982 at 9:30 a.m. in Courtroom 10-B, to determine whether these plans are appropriate & consistent with the injunctive relief previously ordered by this Court, filed.
Aug. 12	Order that a hearing on plaintiff-intervenor Pennsylvania Association for Retarded Citizens' Motion that this Court order the implementation of the report and recommendation of the Special Master concerning the proposed citizen-advocate program shall be held on September 29, 1982 at 9:30 a.m. in Courtroom 10-B, filed.
Aug. 12	Order that a hearing shall be held on October 6, 1982 at 9:30 a.m. in Courtroom 10B for the purpose of hearing proposals and argument concerning amendment of this Court's

order of April 24, 1980 to accurately reflect an enforcement mechanism necessary to replace the monitoring functions of the special master in order to assure adequate habilitation for the members of the Pennhurst class, filed.

DISTRICT COURT OPINION OF MARCH 17, 1978

MEMORANDUM

BRODERICK, J. March 17, 1978.

In an opinion filed on December 23, 1977, this Court made findings of fact and conclusions of law in this matter. Upon its findings, the Court held that the constitutional and statutory rights of the retarded at Pennhurst State School and Hospital ('Pennhurst') had been and are being violated. Some of the determinations made by the Court in its opinion were:

1. That when a state institutionalizes individuals because they are retarded, the United States Constitution (Eighth and Fourteenth Amendments) and the laws of Pennsylvania

(50 P.S. §§4101 et seq.) require the state to provide such minimally adequate habilitation as will afford a reasonable opportunity for them to acquire and maintain such life skills as are necessary to enable them to cope as effectively as their capacities permit.

2. That the Rehabilitation Act of 1973, 29 U.S.C.§794, grants rights to the retarded residents of Pennhurst, which rights have been and are being violated.

3. That the retarded at Pennhurst are not receiving minimally adequate habilitation and that such minimally adequate habilitation cannot be provided at Pennhurst because it does not provide an atmosphere conducive to normalization, which the experts all agree is vital to the minimally adequate

habilitation of the retarded.

Having concluded the liability phase of this litigation, we must now determine the appropriate relief. In view of the Court's finding that institutionalization at Pennhurst is not conducive to normalization, which is vital to the habilitation of the retarded, our Order must provide that immediate steps he taken to remove the retarded residents from Pennhurst. Great caution and care must be exercised, nowever, to make certain that each and every retarded resident who is moved from Pennhurst can be accommodated in a community facility which will provide minimally adequate habilitation. Furthermore, the Court's Order shall not be construed to limit in any manner the use of the Pennhurst facilities from any other purpose in the

future.

A hearing was held on January 6, 1978, at which the Court requested that the parties meet and attempt to agree upon a Court Order which would he acceptable to all the litigants. After meeting, the parties informed the Court that they had been unable to agree and would never be able to agree. The Court then directed that the parties submit proposed Orders detailing their views as to the appropriate relief for the Court to grant together with a memorandum pointing out what they considered unacceptable in their opponent's proposed Order.

The Order submitted by the Commonwealth defendants contained a plan which was essentially the same plan introduced by them at the trial in May, 1977. As was pointed out in this

Court's opinion, the Commonwealth defendants agreed that the retarded should be removed from Pennhurst and readily admitted that the only reason that the litigation was necessary was because they wished to accomplish the closing of Pennhurst as a residence for the retarded, pursuant to their own schedule which was vague and indefinite.

A final hearing was held on January 16, 1978, at which time the parties informed the Court that they did not intend to introduce any additional evidence. All the parties agreed that the record in this case contained all the evidence necessary for the Court to formulate its Order.

Accordingly, we shall this date enter an Order of judgment in favor of the plaintiffs and against the defendants, and shall mandate the

appropriate injunctive relief necessary to remedy the constitutional and statutory violations which the Court in its Opinion of December 23, 1977 found are being suffered by the retarded residents at Pennhurst.

DISTRICT COURT OPINION OF MARCH 17, 1978

O R D E R

AND NOW, this 17th day of March , 1978, pursuant to findings of fact and conclusions of law made by the Court in an Opinion filed December 23, 1977, it is hereby ORDERED that judgment is entered in favor of the plaintiffs and against the defendants, and injunctive relief is ORDERED as follows:

1. Commonwealth and county defendants, their successors, and their officers, agents, servants, employees, attorneys and all persons in active concert or participation with them are permanently enjoined to provide suitable community living arrangements for the retarded residents of Pennhurst, and those retarded persons on its waiting list, together with such community services as are necessary to provide

them with minimally adequatehabilitation until such time as the retarded individual is no longer in need of such living arrangement and/or community service.

2. Commonwealth and county defendants, as aforesaid, are permanently enjoined to develop and to provide a written individualized program plan, formulated in accordance with professional standards (Opinion, page 25; Roos N.T. 1-115, 1-116, Hare N.T. 8-168) to each member of plaintiff class, to provide to each an individualized habilitation program, to provide annual periodic review thereof and the opportunity to each member of plaintiff class and to his or her next friend to be heard thereon.

3. Commonwealth and county defendants, as aforesaid, are

permanently enjoined to provide all necessary and proper monitoring mechanisms to assure that community living arrangements and other community services of the necessary quantity and quality are provided and maintained.

4. Commonwealth and county defendants, as aforesaid, are permanently enjoined to implement with dispatch Act 256 of the 1970 Pennsylvania General Assembly, the specific schedule to be set by further Order of this Court upon recommendation of the Master as set forth in paragraph 6(a) below.

5. The Court, on the basis of nine weeks' testimony in this case and the submissions of all parties, finds that the implementation of this Order will be impossible without the appointment of a Special Master, and,

therefore, pursuant to Rule 53, Fed.R.Civ.P. and in the exercise of the Court's equitable powers, the Court shall appoint a Special Master with the power and duty to plan, organize, direct, supervise and monitor the implementation of this and any further Orders of the Court. Commonwealth and county defendants, their successors, officers, agents, servants, employees, attorneys and all persons in active concert or participation with them shall provide the Master with access to all premises, records, documents and personnel and residents and with every other cooperation and service necessary to the discharge of the Master's duties and shall make available to the Master all professional and other resources of the Department of Public Welfare, the Pennhurst State School and Hospital, the

County Offices of Mental Retardation and the Base Service Units as may be necessary to execute this Court's Orders.

6. The Special Master shall prepare and present to this Court for its approval and Order a Plan of Implementation which shall include the following:

(a) A plan specifying the quantity and type of community living arrangements and other community services necessary for the habilitation of all plaintiffs in the least separate, most integrated, least restrictive community setting, taking into account the existing community services in the five county area and including, by county, specification of the residential, program and staffing patterns necessary, the delineation

of responsibility for their creation and maintenance, their funding and a specified time frame for their provision.

(b) A report specifying resources, procedures, and a schedule for individual evaluations and the formulation of individual exit and community program plans required for the habilitation of each member of plaintiff class and for their periodic review.

(c) A plan for the recruitment, hiring and training of a sufficient number of qualified community staff to be detailed to each Base Service Unit to manage the preparation of individual exit and community program plans for each member of plaintiff class and upon completion of such plans to assist

in the execution of the responsibility to create, develop, maintain, and monitor the community living arrangements and other services required.

(d) A plan for the creation, development and maintenance of mechanisms to monitor a system of community services to assure that community living arrangements and other community services of the necessary quality and quantity are continuously provided to retarded persons in the least separate, most integrated, least restrictive community setting, which plan shall include but shall not be limited to the provision of friend-advocates to assist in the protection of the rights of each member of plaintiff class.

(e) A plan to provide retarded people, members of the class, with continuing information concerning the effect and the implementation of the Court's decision, concerning the plans to provide all necessary community living arrangements and other community services to their relative and any other general or specific information regarding the conditions necessary to habilitation of retarded persons and to provide for consultation with them.

(f) A plan to provide parents and family of the members of the class with continuing information concerning the effect and the implementation of the Court's decision, concerning the plans to provide all necessary community living arrangements and other

community services to their relative and any other general or specific information regarding the conditions necessary to habilitation of retarded persons and to provide for consultation with them.

(g) A plan to provide opportunities for alternative employment to each employee of Pennhurst State School and Hospital, including employment in community programs and otherwise.

7. Within not more than sixty (60) days after appointment, the Master shall file with this Court the reports required at paragraphs 6(a) and (b) above and 11 below. A hearing will then be scheduled by the Court within fifteen (15) days from the date of their filing. Following the adoption of any plan by Order of the Court, it shall be

implemented forthwith.

8. The Master shall engage such staff of his or her own as he or she finds necessary, subject to the approval of the Court. The Master and his or her staff shall be compensated by commonwealth defendants at a rate to be set by the Court; the expenses of themastership shall be borne by the commonwealth defendants. The Master shall promptly submit to the Court a form of Order with respect to these matters.

9. County defendants, as aforesaid, are hereby enjoined from recommending or in any way counselling that any individual be committed to Pennhurst, and from petitioning for the commitment of any individual to Pennhurst, and from advancing in any way any application for admission to

Pennhurst, and are herewith enjoined from participating in any program or activity in connection with the placement in the future or commitment in the future of any retarded person at Pennhurst.

10. Commonwealth defendants, as aforesaid, are hereby enjoined from recommending or in any way counselling that any individual be committed to Pennhurst, and from petitioning for the commitment of any individual to Pennhurst, and from advancing in any way any application for admission to Pennhurst, and are herewith enjoined from participating in any program or activity in connection with the placement in the future or commitment in the future of any retarded person at Pennhurst. Commonwealth defendants are further enjoined from

providing a residence and/or habilitation to any retarded person who is not as of this date a resident at Pennhurst.

11. The Special Master, as aforesaid, shall prepare and present to the Court for its Order a plan for the interim operation of Pennhurst pending its prompt replacement by community living arrangements and other community services. The plan shall address, but need not be limited to, the matters referenced in pararaphs 12-19 below, any other condition at Pennhurst which threatens the life, safety or well-being of any Pennhurst resident, and measures to assure that the interim operation of Pennhurst, including all activities therein, contributes to the prompt provision of services in the community necessary to the habilitation of each

Pennhurst resident.

12. Commonwealth defendants are hereby mandated to take every precaution to prevent the physical or psychological abuse, neglect or mistreatment of any Pennhurst resident. Each and every alleged incident of abuse, neglect or mistreatment shall be promptly investigated. The manner and mechanisms of such investigations shall be developed and established by the plan referenced in pararaph 11.

13. Commonwealth defendants are hereby enjoined to exert the maximum effort in enforcing the following Department of Public Welfare regulations on the 'Use of Restraints in Treating Patients/Residents' and 'Personnel Rules and Institutional Policy on Acts of Abuse Against Patients/Residents' (promulgated in 7 Pennsylvania Bulletin

3199 (October 29, 1977)) which include inter alia the following requirements:

a. That mechanical restraints controlling involuntary movement or lack of muscular control due to organic conditions be employed only as part of an individual program plan, upon a finding of the program team trained in the use of such restraints, and only when necessary to 1) prevent injury to self or others, or 2) promote normative body positioning and physical functioning.

b. That restraints shall be used to control acute or episodic, aggressive behavior only when a resident is acting in such a manner as to be a clear and present danger to self or others and only when less restrictive measures and techniques have been proven to be less

effective.

c. That mechanical restraints may be used only upon the order of a qualified mental retardation professional for a period not to exceed two hours; that the resident must be checked every fifteen minutes and must be examined by a physician before the initial order is renewed.

d. That chemical restraints may be administered only upon the order of a physician.

e. That seclusion (practice of placing a resident alone in a locked room) is prohibited in all cases except where it is apparent that there exists a clear and present danger to the resident, other residents or staff and all other less restrictive methods have failed

or have been deemed inappropriate. (Title XIX - ICF-MR 249.13 and State Agency Letter No. 77-30 issued December 14, 1977).

f. That individual program plans shall require and document that all possible attempts be made at preventing assaultive behavior by positive, constructive intervention.

g. That acts of abuse by employees directed at residents are absolutely prohibited and are cause for disciplinary action including dismissal.

h. That an abusive act is any action which may cause or causes physical or emotional harm or injury and includes any willful action which violates the regulations on use of restraints.

14. Commonwealth defendants are

hereby enjoined from:

(a) Administering excessive or unnecessary medications to class members;

(b) Using medication as punishment, for the convenience of the staff, as a substitute for programming, or in quantities that interfere with a Pennhurst resident's functioning;

(c) Failing to ensure that only appropriately trained staff are allowed to administer drugs to residents;

(d) Failing to provide training programs to staff who administer drugs to residents. The nature of such training programs, and the qualifications to be required of staff members who administer drugs to residents shall be established in

the plan;

(e) Administering drugs to residents on a p.r.n. basis. Written policies and procedures governing the safe administration and handling of medications shall be established pursuant to guidelines developed in the plan.

(f) Failing to monitor and to provide for at least monthly reviews by a physician of each resident's medications.

15. Commonwealth defendants are enjoined from failing to provide a program of medical and health related services for residents which provides accessibility, quality and continuity of care for physical illness or injury. The plan of implementation shall develop and establish detailed standards for the provision of adequate

medical and health related services to residents.

16. Commonwealth defendants are hereby enjoined from failing to provide individualized adaptive wheelchairs to each physically handicapped resident who needs them. Each and every individual resident shall be immediately evaluated to ascertain the need for such equipment.

17. Commonwealth defendants are hereby enjoined from feeding any resident in the supine position or in any position less than the maximum upright position consistent with their capabilities and handicaps.

18. Commonwealth defendants are hereby enjoined from denying anyresident programmed activities as punishment.

19. Commonwealth defendants

are enjoined to take every precaution to keep every Pennhurst building currently housing residents clean, odorless and insect-free at all times.

20. All bulletins, memoranda, directives of official policy issued by the defendants in connection with the implementation of this Court's Order shall, upon issuance, be sent to counsel for each of the plaintiffs.

21. Jurisdiction is retained by this Court until further Order.

(s) RAYMOND J. BRODERICK
RAYMOND J. BRODERICK, J

DISTRICT COURT ORDER OF APRIL 24, 1980

ORDER

AND NOW, this 24th. day of April, 1980, the Court, pursuant to the opinion of the Court of Appeals for the Third Circuit dated December 13, 1979, proposed amendments to its Orders dated March 17, 1978, March 5, 1979, April 26, 1979 and June 8, 1979, having held a hearing thereon, and having received written comments from the parties, hereby ORDERS that said Orders are AMENDED as follows:

I. Order of March 17, 1978 - Original Injunctive Order

The Order of March 17, 1978 is amended so that it now provides:

DISTRICT COURT ORDER OF APRIL 24, 1980

Pursuant to finding of fact and conclusion of law made by the Court in an Opinion filed December 23, 1977, the Court having entered judgment in favor of the plaintiffs and against the defendants, injunctive relief is ORDERED as follows:

1. Commonwealth and county defendants, their successors, and their officers, agents, servants, employees, attorneys and all persons in active concert or participation with them are permanently enjoined to provide suitable community living arrangements for the retarded residents of Pennhurst, and those retarded persons on its waiting list, together with such community services as are necessary to provide them with minimally adequate habilitation until such time as the retarded individual is no longer in need

of such living arrangement and/or community service.

2. Commonwealth and county defendants, as aforesaid, are permanently enjoined to develop and to provide a written individualized program plan, formulated in accordance with professional standards (Opinion, page 25; Roos N.T. 1-115, 1-116, Hare N.T. 8-168) to each member of plaintiff class, to provide to each an individualized habilitation program, to provide annual periodic review thereof and the opportunity to each member of plaintiff class and to his or her next friend to be heard thereon.

3. Commonwealth and county defendants, as aforesaid, are permanently enjoined to provide all necessary and proper monitoring mechanisms to assure that community

living arrangements and other community services of the necessary quantity and quality are provided and maintained.

4. Commonwealth and county defendants, as aforesaid, are permanently enjoined to implement with dispatch Act 256 of the 1970 Pennsylvania General Assembly, the specific schedule to be set by further Order of this Court upon recommendation of the Master as set forth in paragraph 6(a) below.

5. The Court, on the basis of nine weeks' testimony in this case and the submissions of all parties, finds that the implementation of this Order will be impossible without the appointment of a Special Master, and, therefore, pursuant to Rule 53, Fed.R.Civ.P., and in the exercise of the Court's equitable powers, the Court

shall appoint a Special Master with the power and duty to plan, organize, direct, supervise and monitor the implementation of this and any further Orders of the Court. Commonwealth and county defendants, their successors, officers, agents, servants, employees, attorneys and all persons in active concert or participation with them shall provide the Master with access to all premises, records, documents and personnel and residents and with every other cooperation and service necessary to the discharge of the Master's duties and shall make available to the Master all professional and other resources of the Department of Public Welfare, the Pennhurst State School and Hospital, the County Offices of Mental Retardation and the Base Service Units as may be necessary to execute this Court's Orders.

6. The Special Master shall prepare and present to this Court for its approval and Order a Plan of Implementation which shall include the following:

(a) A plan specifying the quantity and type of community living arrangements and other community services necessary for the habilitation of all plaintiffs in the least separate, most integrated, least restrictive community setting, taking into account the existing community services in the five county area and including, by county, specification of the residential, program and staffing patterns necessary, the delineation of responsibility for their creation and maintenance, their funding and a specified time frame for their

provision.

(b) A report specifying resources, procedures, and a schedule for individual evaluations and the formulation of individual exit and community program plans required for the habilitation of each member of plaintiff class and for their periodic review.

(c) A plan for the recruitment, hiring and training of a sufficient number of qualified community staff to be detailed to each Base Service Unit to manage the preparation of individual exit and community program plans for each member of plaintiff class and upon completion of such plans to assist in the execution of the responsibility to create, develop, maintain, and monitor the community

living arrangements and other services required.

(d) A plan for the creation, development and maintenance of mechanisms to monitor a system of community services to assure that community living arrangements and other community services of the necessary quality and quantity are continuously provided to retarded persons in the least separate, most integrated, least restrictive community setting, which plan shall include but shall not be limited to the provision of friend-advocates to assist in the protection of the rights of each member of plaintiff class.

(e) A plan to provide retarded people, members of the class, with continuing information

concerning the effect and the implementation of the Court's decision, concerning the plans to provide all necessary community living arrangements and other community services to them and any other general or specific information regarding the conditions necessary to habilitation of retarded persons and to provide for consultation with them.

(f) A plan to provide parents and family of the members of the class with continuing information concerning the effect and the implementation of the Court's decision, concerning the plans to provide all necessary community living arrangements and other community services to their relative and any other general or

specific information regarding the conditions necessary to habilitation of retarded persons and to provide for consultation with them.

7. As heretofore ordered, the Master shall file with this Court the reports required at paragraphs 6(a) and (b) above. (The report required at paragraph 11 below, having been filed by the Master and approved by this Court, is included in this Order). Hearings will hereafter be scheduled by the Court concerning the adoption of the plans under paragraphs 6(a) and 6(b). Following the adoption of any plan by Order of the Court, it shall be implemented forthwith.

8. The Master shall engage such staff of his or her own as he or she finds necessary, subject to the approval of the Court. The Master and

his or her staff shall be compensated by commonwealth defendants at a rate to be set by the Court; the expenses of the mastership shall be borne by the commonwealth defendants. The Master shall promptly submit to the Court a form of Order with respect to these matters.

11. The Special Master, as aforesaid, shall prepare and present to the Court for its Order a plan for the interim operation of Pennhurst pending its prompt replacement by community living arrangements and other community services. The plan shall address, but need not be limited to, the matters referenced in paragraphs 12-19 below, any other condition at Pennhurst which threatens the life, safety or well-being of any Pennhurst resident, and measures

to assure that the interim operation of Pennhurst, including all activities therein, contributes to the prompt provision of services in the community necessary to the habilitation of each Pennhurst resident.

12. Commonwealth defendants are hereby mandated to take every precaution to prevent the physical or psychological abuse, neglect or mistreatment of any Pennhurst resident. Each and every alleged incident of abuse, neglect or mistreatment shall be promptly investigated. The manner and mechanisms of such investigations shall be developed and established by the plan referenced in paragraph 11.

13. Commonwealth defendants are hereby enjoined to exert the maximum effort in enforcing the following Department of Public Welfare regulations

on the "Use of Restraints in Treating Patients/Residents" and "Personnel Rules and Institutional Policy on Acts of Abuse Against Patients/Residents" (promulgated in 7 Pennsylvania Bulletin 3199 (October 29, 1977)) which include inter alia the following requirements:

a. That mechanical restraints controlling involuntary movement or lack of muscular control due to organic conditions be employed only as part of an individual program plan, upon a finding of the program team trained in the use of such restraints, and only when necessary to 1) prevent injury to self or others, or 2) promote normative body positioning and physical functioning.

b. That restraints shall be used to control acute or

episodic, aggressive behavior only when a resident is acting in such a manner as to be a clear and present danger to self or others and only when less restrictive measures and techniques have been proven to be less effective.

c. That mechanical restraints may be used only upon the order of a qualified mental retardation professional for a period not to exceed two hours; that the resident must be checked every fifteen minutes and must be examined by a physician before the initial order is renewed.

d. That chemical restraints may be administered only upon the order of a physician.

e. That seclusion (involuntary placement of a resident

alone in a locked enclosure) is prohibited in all cases except where it is apparent that there exists a clear and present danger to the resident, other residents or staff and all other less restrictive methods have failed or have been deemed inappropriate. (Title XIX--ICF-MR 249.-13 and State Agency Letter No. 77-30 issued December 14, 1977.)

f. That individual program plans shall require and document that all possible attempts be made at preventing assaultive behavior by positive, constructive intervention.

g. That acts of abuse by employees directed at residents are absolutely prohibited and are cause for disciplinary action including

dismissal.

h. That an abusive act is any action which may cause or causes physical or emotional harm or injury and includes any willful action which violates the regulations on use of restraints.

14. Commonwealth defendants are hereby enjoined from:

(a) Administering excessive or unnecessary medication to class members;

(b) Using medication as punishment, for the convenience of the staff, as a substitute for programming, or in quantities that interfere with a Pennhurst resident's functioning;

(c) Failing to ensure that only appropriately trained staff are allowed to administer drugs to residents;

(d) Failing to provide training programs to staff who administer drugs to residents. The nature of such training programs, and the qualifications to be required of staff members who administer drugs to residents shall be established in the plan.

(e) Administering drugs to residents on a p. r. n. basis. Written policies and procedures governing the safe administration and handling of medications shall be established pursuant to guidelines developed in the plan;

(f) Failing to monitor and to provide for at least monthly reviews by a physician of each resident's medications.

15. Commonwealth defendants are enjoined from failing to provide

a program of medical and health related services for residents which provides accessibility, quality and continuity of care for physical illness or injury. The plan of implementation shall develop and establish detailed standards for the provision of adequate medical and health related services to residents.

16. Commonwealth defendants are hereby enjoined from failing to provide individualized adaptive wheelchairs to each physically handicapped resident who needs them. Each and every individual resident shall be immediately evaluated to ascertain the need for such equipment.

17. Commonwealth defendants are hereby enjoined from feeding any resident in the supine position or in any position less than the maximum upright position consistent with their

capabilities and handicaps.

18. Commonwealth defendants are hereby enjoined from denying any resident programmed activities as punishment.

19. Commonwealth defendants are enjoined to take every precaution to keep every Pennhurst building currently housing residents clean, odorless and insect-free at all times.

20. All bulletins, memoranda, directives of official policy issued by the defendants in connection with the implementation of this Court's Order, shall, upon issuance, be sent to counsel for each of the plaintiffs.

21. Jurisdiction is retained by this Court until further Order.

II. Order of March 5, 1979 - Interim Operation of Pennhurst

The Order of March 5, 1979 is

amended so that it now provides:

TABLE OF CONTENTS

PART I - INTERIM PLAN FOR PENNHURST RESIDENTS AT THE INSTITUTION

1.0 The Role of the Pennhurst Liaison from the Office of the Special Master

2.0 Orientation and Familiarization with All Plans Coming from the Office of the Special Master

3.0 Specific Procedures to Protect Pennhurst Residents in Response to Items #12-19 of the Court Order

3.1 Resident Abuse

3.2 Use of Restraints

3.3 Seclusion

3.4 Medication Practices

3.5 Health Care Procedures

3.6 Provision of Adaptive Wheelchairs and Other Orthotic Devices

3.7 Positioning of Residents at Mealtime

3.8 Punitive Denial of Program Activities

3.9 Sanitation

3.10 Reporting and Follow-Up Procedure

4.0 Monitoring Systems

4.1 Employees

4.2 Reports and Checklists

4.3 Role of the Special Assistant to the Superintendent

4.4 Site Visits

4.5 Participation of Other Groups

5.0 Other Provisions for Residents at Pennhurst

5.1 Refilling All Positions at Pennhurst

5.2 Provision of Ramps

6.0 Potential Consequences of Non-Compliance

PART II - PROVISIONS FOR RESIDENTS WHO WILL BE MOVING INTO THE COMMUNITY BEFORE COUNTY PLANS ARE IN EFFECT

7.0 Responsibility of the Commonwealth of Pennsylvania, the Southeastern Regional Office of the Department of Public Welfare and County Offices

7.1 The Commonwealth of Pennsylvania

7.2 The Southeastern Regional Office of the Department of Public Welfare

7.3 The County Offices of Mental Health/Mental Retardation

8.0 Responsibilities and Training of 30 Additional Case Managers

9.0 Certified Advocates

11.0 Relocation of Plaintiff Class Members

APPENDIX A - Notice: Procedures for Protecting Pennhurst Residents While They Live at the Institution

APPENDIX C - Pennhurst's Policy on Abuse

APPENDIX D - Department of Public Welfare Rules of Use of Restraints and Patient Abuse

APPENDIX E - Report Forms

1.0 The Role of the Pennhurst Liaison from the Office of the Special Master

The Pennhurst Liaison from the Office of the Special Master shall have an office at Pennhurst. This person

shall represent the Office of the Special Master on all matters relating to Pennhurst and the carrying out of the Court Order. In order to assure that Pennhurst is complying with the Court Order the Liaison shall:

1.1 Be available to the Superintendent of Pennhurst at all times to provide assistance, support and clarification of any issues regarding the interim operation of Pennhurst.

1.2 Ensure that all institution employees are provided with an orientation to the Court Order.

1.3 Monitor the institution's compliance with the Court

Order.

1.4 Support the Pennhurst residents' transition into appropriate community programs.

2.0 Orientation and Familiarization with All Plans Coming from the Office of the Special Master

In order to assist the employees at Pennhurst in carrying out their responsibilities to the residents of the institution, the Pennhurst Liaison from the Office of the Special Master shall assure the implementation of the following procedures:

2.1 Continued orientation to the Court Orders shall be provided to all Pennhurst employees.

2.2 Each employee shall be provided a copy of this Plan. This Plan shall be distributed at the time of employee orientation. New employees shall receive copies during their orientation programs. A notice shall also be posted within all Pennhurst living areas by the Unit Director and in all service areas by respective Department Heads. (See Notice in Appendix A).

2.3 The Staff Development Office shall be responsible for the identification of

instructors, preparation of materials, and scheduling for training sessions. These training sessions, designed to assist employees in carrying out Items 12-19 of the Order of March 17, 1978, as amended herein, shall be reviewed and approved by the Pennhurst Liaison.

2.4 Orientation sessions shall be completed by 30 days from Court approval of this Plan. There after, orientation sessions will be included in the regular Pennhurst orientation for new employees.

3.0 Specific Procedures to Protect Pennhurst Residents in Response to Items #12-19 of the Order of March 17, 1978, as Amended Herein

This section details the procedures for complying with Items #12-19 of the Order of March 17, 1978 as amended herein. It also specifies persons responsible for carrying out those procedures.

3.1 Resident Abuse (Item #12). Abuse is any action which may cause or causes, physical or psychological harm or injury and includes any willful action which violates regulations on use of restraints. Any abuse, neglect, or mistreatment of any resident, whether

it be physical or psychological, shall not be tolerated.

3.1.1 Physical Abuse. Physical abuse includes, but is not limited to: (a) hitting, (b) kicking, (c) corporal punishment, or any other activity which results in physical pain as specified in the current Pennhurst Physical Abuse and Exploitation Policies. (See Appendix C). The Assistant Superintendent of Developmental Services shall assure that copies of the Pennhurst Physical Abuse and Exploitation Policies are placed in a proper and

conspicuous place within each living area.

3.1.2 Psychological Abuse. Psychological abuse includes, but is not limited to: (a) harrassment, (b) screaming, (c) name-calling, (d) obscene or cursing language directed at a resident, (e) threats damaging to a resident's self-respect.

3.1.3 Investigation of Physical and Psychological Abuse. (Item #12) Pennhurst Security Police shall begin investigating all suspicious or unexplained injuries and alleged resident abuse upon report of the alleged

incidents. Upon receipt of said report, the Pennhurst Security Police shall immediately notify the Superintendent or his designee and the liaison to the office of the Special Master. Copies of all investigative reports regarding cases of abuse shall be delivered to the Superintendent of Pennhurst, the Liaison to the Office of the Special Master, and the State Police within 48 hours after completion of the investigation. Pennhurst Security Police shall follow Department of Public Welfare guidelines

for investigating instances of alleged abuse. All reports shall be prepared according to a format approved by the Office of the Special Master. All forms shall be prepared and reviewed within ten days after approval of this Plan by the Court.

3.2 Use of Restraints. (Item #13). All employees shall observe the Department of Public Welfare regulations on the "Use of Restraints in Treating Patient/ Relations" and "Personnel Rules and Institutional Policy on Acts of Abuse

Against Patients/ Residents." (See Appendix D).

3.2.1 Restraint Reports. The Ward Nurse shall prepare a report for each instance of restraint at the end of his/her shift and shall submit all reports to the Special Assistant to the Superintendent daily. All reports shall be prepared according to a format approved by the Office of the Special Master. All forms shall be prepared and reviewed within ten days after approval of this Plan.

3.2.2 Follow-Up on

Chemical Restraint. The Director of Nursing or Assistant Director of Nursing shall:

a) Verify that a physician has ordered the chemical restraint.

b) Verify that Pennhurst policies were followed in using the chemical restraint.

3.2.3 Follow-Up on Mechanical Restraint. The staff of the Special Assistant to the Superintendent shall:

a) Interview the resident who was restrained.

b) Interview the staff who applied and witnessed

the application of the restraint.

c) Verify the correct use of the restraint. In addition, the Liaison to the Office of the Special Master shall regularly and randomly monitor the above procedures, a, b, and c.

3.2.4 Results of Reports

The Special Assistant to the Superintendent shall submit copies of all reports regarding abuse or restraints to the Superintendent and the Liaison to the Office of the Special Master within 24 hours of the follow-up interview.

3.3 Seclusion (Item #13)

Seclusion is involuntary

placement of an individual alone in a locked enclosure. Locked Time out is the procedure that shall be followed. This procedure has been developed by the Behavior Modification Committee and reviewed and approved by the Liaison from the Office of the Special Master. A copy of the procedure shall be available in all living areas.

3.4 Medication Practices (Item #14)

3.4.1 Review of Medical Records. All medical records shall be reviewed monthly by the prescribing

physician to determine if the medication regimen is appropriate and consistent with the needs of the Pennhurst resident and the Court Order. Each month the following procedures shall occur:

a) The Pennhurst Medical Director shall randomly review 5% of Pennhurst residents' medical records.

b) An independent physician approved by the Office of the Special Master shall randomly review 10% of Pennhurst residents' medical

records.

3.4.2 Medical Director's Report. Each month the Pennhurst Medical Director and the independent physician approved by the Office of the Special Master shall separately submit a report which shall specify whether medication is:

a) Given in necessary quantitities.

b) Not used for punishment or restraint.

c) Not used for staff convenience.

d) Not used in amounts that interfere with the resident's overall functioning.

e) Not used as a substitute for programming.

f) Given only by appropriately trained staff.

g) Not used on an "as needed" basis.

h) Reviewed biweekly by the prescribing physician.

i) Consistent with the Client's Individual Plan.

j) Consistent with the Physician's Case Management Plan.

3.4.3 Qualifications for Administering Medication. The Medical Director, Director of Nursing, Director of Staff

Development and the Director of Professional Standards of Compliance shall:

a) Review the qualifications of every staff member who administers medication in compliance with Act 151 Professional Nursing Act & Practical Nurse Law.

b) Post a list of qualified persons in every living area. Only those on the list shall administer medication. The list shall be updated at least every six months.

3.5 Health Care Procedures. (Item #15). Any complaint from a Pennhurst resident

of nausea, pain or other discomfort shall be recognized and brought to the attention of the nurse immediately who shall conduct a follow-up examination. The nurse shall notify the physician if further treatment is needed. The physician shall be responsible for providing or obtaining that treatment. Changes in the functioning of a Pennhurst resident shall not be overlooked. The continuous practice of good health care shall be assured by the following procedures:

3.5.1 Each Pennhurst resident shall receive a physical examination by appropriate licensed specialists at least annually. This service shall include but not be limited to speech, audiology, physical therapy, occupational therapy and neurology. Examinations may be more frequent if the physician or other qualified person determines the need. (ICFMR Title XIX Regulations).

3.5.2 Dental examinations shall be provided every six months. Any further dental services shall be

provided according to the individual needs of each resident.

3.5.3 Any Pennhurst resident who needs diagnostic, therapeutic or medical procedures not available at Pennhurst shall receive them from outside resources.

3.5.4 The Pennhurst Medical Director shall within ten days of this Order develop a comprehensive examination schedule subject to the review and approval of the Superintendent of Pennhurst and the Liaison to the Office of the Special Master. This

examination schedule shall coincide with each resident's Annual Program Review Schedule.

3.5.5 The Ward Clerk shall notify the Ward Nurse and Unit Director when examinations are due.

3.5.6 The Ward Clerk shall notify the Superintendent by phone and memo when an examination is 15 days overdue.

3.5.7 The Pennhurst Medical Director shall within 90 days of this Order develop a procedure for the health care of each Pennhurst resident subject to review and

approval by the Office of the Special Master in consultation with an independent health care authority.

3.5.8 Therapeutic services shall be provided on an individual basis.

3.5.9 All matters related to the health of each resident shall be recorded in his/her ward file.

3.6 The Provision of Adaptive Wheelchairs and Other Orthotic Devices. (Item #16). Each resident needing an adaptive wheelchair or other orthotic device shall receive it within 60 days of this Order. (An

orthotic device is one which serves to protect, restore or improve functioning.)

3.6.1 Procurement and modification of adaptive wheelchairs and other orthotic devices within 60 days of this Order shall be the combined responsibilities of the Physical Therapy, Occupational Therapy and Maintenance Departments. Consultants shall be identified by the Office of the Special Master to provide technical assistance concerning the adaptation of wheelchairs and other orthotic devices.

3.6.2 The Program Manager shall see that the resident's name is placed on his/her wheelchair or orthotic device in a reasonably inconspicuous place.

3.6.3 The Program Manager shall see that a record of the date(s) of procurement and modification of the device(s), as well as maintenance instructions, shall be placed in the resident's ward file.

3.6.4 The Program Manager of each living area shall see that each resident is using his/her own chair and complete a checklist assuring that the chair is

working properly. In addition, the program manager shall see that each resident uses his/her wheelchair and/or orthotic device on a daily basis according to the resident's level of tolerance and recommendations from P.T.; OT; and M.D. The report shall be sent to the Occupational Therapy Department. Copies of the report shall be sent to the Unit Director and Superintendent.

3.6.5 Any person who observes a resident in the wrong chair or identifies a chair in need of repair

shall report it to the Program Manager immediately.

3.7 Positioning of Residents at Mealtime. (Item #17).

3.7.1 The physician shall determine the proper mealtime position and recommend, if necessary, a sitting tolerance program to assist the resident in achieving that position. Once the proper position has been achieved, the Occupational Therapist shall evaluate the client's oral motor functions and provide the appropriate program. The program shall be included in the resident's ward

chart. Each resident with a medical limitation on sitting shall be evaluated quarterly to determine whether his/her position is appropriate, and whether a change in positioning is needed. Documentation of the evaluation shall be placed in the resident's ward file.

3.7.2 A photograph of each resident in his/her proper mealtime position shall be placed where staff feeding the resident can easily see it.

3.7.3 The Program Manager in each living area shall assure that each resident

eats in his/her proper mealtime position. The Charge Aide shall immediately notify the Unit Director if any resident is found in any position other than that prescribed by the physician.

3.8 Punitive Denial of Program Activities. (Item #18). Program activities are important to the development of an individual's skills. Consequently:

3.8.1 No program activities shall be withheld from a resident for punitive reasons. Program activities include

recreation and leisure activities. A program activity shall only be withheld ifthe program team has determined that such action has therapeutic value. However, positive interventions shall be used whenever possible.

3.9 Sanitation. (Item #19). Adequate cleanliness and sanitation are particularly difficult but essential to maintain. Consequently, this procedure requires a great deal of attention and cooperation.

3.9.1 The Director of Housekeeping and Unit Director shall within 20 days of this Order develop a schedule of housekeeping

responsibilities which shall be reviewed and approved by the Liaison to the Office of the Special Master and posted in every living area.

3.9.2 All areas shall be swept and mopped by members of the housekeeping staff daily.

3.9.3 In the dining area, tables shall be cleaned and floors swept after each meal.

3.9.4 The Charge Aide shall make a thorough inspection of the living area daily, complete a checklist and notify the Director of Housekeeping of what needs to be

cleaned. If a correction is not made within 24 hours, the Charge Aide shall send an Action Check Form to the Unit Director and the Superintendent.

3.9.5 In areas where residents are incontinent, the Charge Aide shall make rounds every hour to see that the residents and the areas are kept clean.

3.9.6 Any person observing urine or feces on the floor or on a resident shall notify the Charge Aide, who shall see that the resident and area are cleaned as soon as possible. If the resident is not cleaned within 30

minutes, and if the area is not cleaned within 60 minutes, the Charge Aide shall notify the Unit Director who shall see that appropriate action is taken.

3.9.7 Any person detecting an area permeated with foul odors shall notify the Charge Aide who shall see that the area is sanitized and that the odor has been eradicated.

3.9.8 Leaking or clogged toilets and sinks and bathing facilities shall be repaired as soon as possible after discovery.

3.9.9 Each day the Charge

Aide shall thoroughly inspect the living area for infestations. If infestations are found, the Charge Aide shall notify the Director of Housekeeping. If no corrective action is taken, (within 24 hours), the Charge Aide shall notify the Unit Director and Superintendent.

3.9.10 All employees shall assure that residents are protected from harmful chemicals used for sanitizing or other health-related reasons.

3.10 Reporting and Follow-up Procedures

Court Order Number/Topic	Detection	Report To	Follow-up	Corrective Action/ Discipline
12 Abuse	Any Staff	Superintendent, Any Supervisor	Security	Superintendent, Unit Director
Neglect	Any Staff	Superintendent, Program Manager	Unit Director	Superintendent, Unit Director
13 Restraints (physical)	Any Staff	Superintendent, Program Manager	Behavior Mod. Chairperson	Superintendent, Unit Director
Seclusion	Any Staff	Superintendent Program Manager	Behavior Mod. Chairperson	Superintendent, Unit Director
Chemical Restraint	Any Staff	Superintendent, Nurse	Dir. Nursing Ass.Dir.Nrs.	Superintendent, Director of Nursing
14 Medical Violations	Any Staff	Superintendent, Director of Nursing	Medical Dir.	Superintendent, Director of Nursing
15 Health Care	Any Staff	Superintendent, Ward Nurse	Director of Nursing	Superintendent, Director of Nursing
Routine Exams	Ward Clerk	Superintendent, Ward Nurse, Unit Director	Director of Nursing	Superintendent, Director of Nursing
16 Wheelchairs	Any Staff	Superintendent, Program Manager or Unit Director	Director of O.T.	Superintendent, Unit Director, Department Head
17 Mealtime Violations	Any Staff	Superintendent, Program Manager or Unit Director	Director of O.T., Unit Director	Superintendent, Unit Director
18 Program Denial	Any Staff	Superintendent, Program Manager or Unit Director	Behavior Mod. Committee	Superintendent, Unit Director Program Manager
19 Sanitation Violations	Any Staff	Superintendent, Unit Director	Housekeeping Director	Superintendent, Housekeeping Director, Unit Director

Any violations of a component of the Court Order not listed in this Table observed by any employee, shall be reported directly to the Superintendent. Copies of reports and corrective actions taken will be submitted to the Liaison to the Office of the Special Master.

4.0 Monitoring Systems

This section describes systems for monitoring compliance with the procedures to protect Pennhurst residents as detailed in Section 3.0.

4.1 Employees. The employees of Pennhurst are in a position to have a direct and lasting influence on the lives of Pennhurst residents. Consequently, every employee shall be responsible for reporting any instance of non-compliance with the Order and the procedures in this Plan.

4.2 Reports and Checklists

4.2.1 Action Check Form. This form (See Appendix·

E) shall be used solely for the reporting of violations of the Court Order and of this Plan. It shall include:

a) The date and time of observation.

b) A description of what was observed.

c) The name and telephone number of the person reporting the violation.

d) Space for the Superintendent to indicate investigatory responsibility and date of assignment. The completed form shall be sent to the

Special Assistant to the Superintendent.

4.2.2 Follow-up Report Form.

This form (See Appendix E) shall be used to:

a) Verify facts contained in the original report.

b) Indicate probable causes and person(s) responsible.

c) Outline corrective steps and time schedules for carrying them out. A member of the Management Staff responsible for the follow-up procedure, (See table, 3.10) shall complete and

return the form to the Superintendent within 48 hours of the reported incident. Copies of the report shall be sent to:

a) The reporter of the observed incident.

b) The Special Assistant to the Superintendent.

c) The person conducting the investigation.

d) The Liaison to the Office of the Special Master.

4.2.3 Superintendent's Response to Written Reports.

Within ten days of the follow-up report, a member of the Staff of the Special

Assistant will verify results of the original report and the subsequent follow-up and investigation (See Appendix E). The Superintendent will review all reports of the incident within 24 hours. The Superintendent will see that the appropriate corrective procedures including disciplinary action, have been carried out. If the result of findings in the investigation of a

complaint reveals negligence or non-cooperation, the person responsible shall be subject to Department of Public Welfare disciplinary action which may include:

a) Formal reprimand.

b) Re-assignment.

c) Suspension.

d) Termination.

NOTE: If such disciplinary action is warranted, the employee involved shall follow respective grievance procedures. When all remedies have been fully implemented, a total report shall be submitted to the Superintendent and the

Liaison to the Office of the Special Master.

4.3 The Role of the Special Assistant to the Superintendent. The Assistant to the Superintendent shall be responsible to the Superintendent for the orderly monitoring of all matters related to the Court Order. A group of persons, supervised by the Special Assistant, shall assist in this effort.

This group shall:

a) Not be responsible for service provision.

b) Report to the Superintendent through the Special Assistant.

c) Receive copies of all complaints from Pennhurst

employees about violations of the Court Order and this Plan.

d) Verify for the Superintendent that steps have been taken to correct specific problems.

e) Conduct random site visits to living areas to review compliance with the procedures outlined in this Plan.

f) Maintain a file of all complaints received, all investigative reports and written responses from the Superintendent.

g) Provide copies of reports and findings to the Liaison to the Office of the Special Master on a

weekly basis.

4.4 Site Visits

4.4.1 Groups concerned about Pennhurst resident may wish to make site visits to review compliance with the procedures in this Plan. Groups wishing to make site visits under the auspices of the Office of the Special Master shall do so under the supervision of that office.

They shall:

a) Notify the Liaison from the Office of the Special Master. (Although these visits may be unannounced, the Liaison must be informed).

b) State the purpose for making the visit.

c) Provid the date, time and location(s) of visit.

4.4.2 Site visits shall be approved by the Office of the Special Master only after the above information has been provided.

4.4.3 Any group wishing to make site visits in a

manner different from that described above shall make separate arrangements with the Superintendent of Pennhurst.

4.5 Participation of Other Groups. Other groups may wish to assist the Office of the Special Master in assuring that the procedures of this Plan are carried out. Each such group shall submit a detailed proposal to the Office of the Special Master where it shall be determined whether

the proposal is consistent with the efforts of that Office. Any groups participating along with the Office of the Special Master shall do so under that Office's supervision.

5.0 Other Provisions for Residents at Pennhurst

The protection procedures detailed in Section 3.0 directly respond to Items #12-19 in the Court Order. The following provisions shall also be made for the protection of individuals residing at Pennhurst.

5.1 Refilling All Positions at Pennhurst. Upon Court approval of this Plan, Pennhurst shall be exempted from the Salaried Complement Authorization Request (SCAR). The Superintendent of Pennhurst, with approval of the Special Master, shall be given full authority to refill any direct care position on a temporary basis as quickly as possible in order to meet the intent and requirements of the Court Order. This procedure shall remain in effect until such time as staffing needs no longer

require immediate filling of vacant positions.

5.1 Provision of Ramps. Ramps shall be installed at Pennhurst buildings "D" and "T" within 15 days of this Order to assure their accessibility to residents.

6.0 Potential Consequences of Non-Compliance

All persons having direct or indirect contact with Pennhurst residents shall be responsible for their protection as provided in the Orders of this Court.

PART II - PROVISIONS FOR RESIDENTS WHO WILL BE MOVING INTO THE COMMUNITY

7.0 Responsibilities of the Commonwealth Defendants and County Offices of Mental Health and Mental Retardation

7.1 The Commonwealth Defendants

7.1.1 The Commonwealth Defendants shall provide continuing support and assistance to the Pennhurst residents as they move into community programs. That support shall include, but not be limited to, planning, monitoring, financial and technical assistance, and training.

7.1.2 The Commonwealth

Defendants shall continue to provide funds to the counties to employ thirty case managers and 5 case management supervisors, and provide necessary support services for them.

7.2 The County Offices of Mental Health/Mental Retardation

7.2.1 The County offices shall provide continuing support for the residents of Pennhurst and any other individuals

affected by the Court Order, in accordance with the regulations of the Department of Public Welfare Title 5200, County Mental Health and Mental Retardation Program Service Content of the Program, including 5200 Appendix IV Mental Retardation Responsibilities and any other regulations promulgated by the Department under 50$ P.S. 5201;2) relating to the County Mental Retardation Program.

7.2.2 The County Offices

shall (with review and approval by the Office of the Special Master) directly employ and provide support services for the 30 case managers and 5 supervisors (see section 7.1.2) assigned to the Southeastern Region of Pennsylvania. The Local Authorities of each of the five counties in the Southeastern Region of Pennsylvania shall promptly take all necessary steps to maintain the employment of 30 case

managers and 5 supervisors.

8.0 Responsibilities and Training of the 30 Case Managers

8.1 These 30 additional case managers (see sections 7.1.2 and 7.3.2) employed and assigned to the shall only be responsible for serving members of class. They shall:

a) Implement those case management activities as identified in the IHP guidelines developed by the Office of the Special

Master.

b) Assure access to the individual determination process for each member of the plaintiff class.

c) Ensure the development and implementation of all services as prescribed in the Individual Habilitation Plan.

8.2 Training these case managers shall be the responsibility of the Office of the Special Master. The Office shall coordinate the duties of the 30 case managers and 5 supervisors for a period

of time to be determined by the Special Master to fulfill the requirements of this Plan and the Order.

9.0 The Certified Advocate

In the absence of a parent/-guardian, or at their request, or upon the request of a Pennhurst resident, a trained Certified Advocate shall be assigned to the member of the plaintiff class consistent with the IHP Guidelines of the Office of the Special Master.

11.0 Relocation of Plaintiff Class Members

The relocation of any member of the plaintiff class, including those currently at Pennhurst, must proceed consistent

with the IHP guidelines and thus be submitted to the Office of the Special Master for review and approval.

[APPENDICES DELETED]

III. Order of April 26, 1979 - Employee Services

The Order of April 26, 1979 is VACATED.

IV. Order of June 8, 1979 - School Age Children

The Order of June 8, 1979 is amended so that it now provides:

IT IS HEREBY ORDERED that the defendants must make every good faith effort to accomplish the following:

1. The Commonwealth, as heretofore ordered, shall notify Chester, Delaware, Montgomery and Philadelphia Counties of the availability of funds to develop and maintain the necessary living arrangements and services for the school-age residents of Pennhurst. The first-quarter advance allocation to each

County for each school-age resident returning to that County shall be an amount equal to one quarter of 80% of the average annual cost for a resident at Pennhurst, as budgeted for 1979-80.

2. The Counties shall, as heretofore ordered, solicit specific proposals from experienced and competent providers for the residential, core team, respite care, and other services which are necessary for the support of returning residents.

3. The Counties shall, as heretofore ordered, receive service proposals. The proposals must reflect the assurance that providers have met, and reviewed information about, the persons they wish to serve, and must include initial budget projections.

4. The County case

managers shall, as heretofore ordered, and consistent with this Order, begin the assessment and individual habilitation plan process for the school-age persons at Pennhurst. Parents-guardians must be given the opportunity to participate in this planning process. Residential and support service providers and the relevant school district/intermediate unit staff shall be included as team members at the earliest possible date.

5. The Commonwealth defendants shall, as heretofore ordered, submit to the Special Master for review and approval a proposal for mandatory pre-service and in-service training for provider agency staff, including curricula and schedules, which training

may be provided either directly by Commonwealth defendants or through contractual arrangement. Such proposal shall reflect the review and suggestions of the four-county Mental Health/Mental Retardation administrators and of provider agencies.

6. The County defendants shall, as heretofore, ordered, following review and approval of service proposals by the Special Master, award contracts for the provision of necessary residential, core team, respite care and other support services for the school-age residents returning from Pennhurst.

7. The County case managers shall, as heretofore ordered, complete the initial individual habilitation plans for the school-age

Pennhurst residents.

8. The Counties shall, as heretofore ordered, submit to the Special Master, a plan describing the prescribed non-residential services (e.g., leisure activities, special therapies, medical services, etc.), and detailing how those services shall be acquired/provided. This plan must conform to the specifications of the individual habilitation plan.

9. Provider agencies under contract shall, as heretofore ordered, submit to the Counties such program and budget revisions for residential, core teams, respite care, and other support services, as are suggested or required by the individual habilitation plans.

10. The Commonwealth

shall, as heretofore ordered, submit to the Special Master for review and approval a plan and schedule describing the program and fiscal monitoring mechanisms which it shall exercise for these new programs, consistent with this order.

11. The County defendants shall ensure the appropriate involvement of the Regional Office of the Department of Public Welfare in the review and approval of residential sites and shall ensure that program staff hired by provider agencies participate in mandatory training sponsored by the Commonwealth.

12. For the period following the first quarter, the Commonwealth shall make quarterly grants to each County in advance of each

quarter. The amount of each quarterly grant shall be based on a projection of anticipated actual reimbursable costs for the next quarter. At least twenty (20) working days prior to each quarter, the Commonwealth shall submit to the Special Master for review and approval its projected advance payments for each County and the basis for that projection. The advance shall be adjusted by the Commonwealth if the Special Master's review suggests that an adjustment is necessary to expedite implementation of the quantity and quality of community services consistent with the Orders of this Court. The Commonwealth may recover at the close of each quarter unexpended funds advanced under this Order for non-reimbursable expenditures.

13. The Counties, where required by State law, shall provide a match with County funds, and shall provide to the Department and the Special Master in a timely fashion such data as is required to project future quarterly costs.

14. County defendants shall ensure that all necessary residential, core teams, respite care, and other support services for the school-age residents of Pennhurst will be available on or before June 30, 1980.

15. Upon completion of the individual habilitation plan and assurance that all necessary services are available, the case manager, shall, with the involvement of other appropriate parties, develop a plan for gradual transition to the community that

will be least disruptive to the client. This plan shall be consistent with the procedures for individual determinations set forth in this Order. One month after placement, the case manager shall prepare a written progress report of the placement and submit it to the Special Master and parent/guardian.

16. The Special Master shall report to the Court the progress that has been made toward implementation of this Order.

17. No school-age resident of Pennhurst shall be returned to the community unless and until an appropriate community living arrangement has been established in accordance with that resident's individual habilitation plan which has been developed with the opportunity for full participation by

the resident's parents or guardians and other advocates for the resident, and unless and until appropriate educational facilities are available in accordance with that resident's individual educational plan, which has been developed with the opportunity for full participation by the resident's parents or guardians and other advocates for the resident.

18. The time schedule hereinabove set forth establishes target dates, and defendants are directed to make every good faith effort to accomplish the directives of this Order on or before the times specified, bearing in mind at all times that nothing shall be permitted to interfere with the Court's finding and decision that defendants are required to provide

for the retarded residents of Pennhurst such minimally adequate habilitation as will afford a reasonable opportunity for them to acquire and maintain such life skills as are necessary to enable them to cope as effectively as their capacities permit.

V. It is FURTHER ORDERED that:

Individual Determinations

The orderly return of residents from Pennhurst to appropriate community living arrangements (CLA's) depends upon the careful development of individual habilitation plans (IHP's). The following procedures are intended to assure that each IHP reflects the best interests of the person for whom it was prepared.

1. Notification of Planning Process

Before any aspect of the

planning process begins, the Pennhurst resident, parent/guardian,[1] and/or certified advocate shall be notified that they have the opportunity for full participation in the development of the IHP.

2. Individual Plan Development

The Planning and Assessment Team (including, but not limited to, the Pennhurst resident, case manager, parent/guardian and/or certified advocate) shall meet to develop an Individual Habilitation Plan (IHP) for habilitation of the Pennhurst resident in an appropriate community living

---

1 Wherever the term "parent/guardian" appears in this Order, it shall be interpreted to include, in the parents/guardians.

arrangement (CLA). The IHP shall be developed in accordance with the IHP Guidelines (Guidelines) prepared by the Special Master and incorporated herein by reference and shall include plans for the CLA and all supportive services, and emergency and respite care where necessary. The Special Master shall monitor defendants' efforts in providing the CLA and other services necessary in accordance with the IHP. Adequate notice of all Team meetings shall be given to all Team members. Any member of the Team who has received notice of a Team meeting and fails or refuses to participate shall continue to receive notice of future Team meetings, but meetings may proceed without their participation. Team members shall have access to all records and documents to

the provisions of the IHP, the Deputy Secretary for Mental Retardation or her designee shall work with Team members and shall attempt to resolve any disagreement concerning the provisions of the IHP. The Special Master shall, however, review each IHP to ensure that it provides, in the least restrictive setting, such minimally adequate habilitation as will afford a reasonable opportunity for each individual to acquire and maintain such life skills as are necessary to enable him or her to cope as effectively as his or her capacities permit.

3. Hearing Master

The Court shall appoint a Master, hereinafter referred to as the Hearing Master, who shall have the responsibility to conduct hearings as

provided in this Order. The Hearing Master shall be independent of the Special Master previously appointed by this Court and shall be subject only to the direction of the Court.

The Hearing Master shall engage such clerical staff as he finds necessary, and shall arrange for office and hearing space subject to the approval of the Court. The Master and staff shall be compensated by Commonwealth defendants at a rate to be set by the Court. The expenses of the mastership, including, but not limited to, office and hearing space, supplies, and equipment, shall be borne by Commonwealth defendants. The Hearing Master shall promptly submit to the Court a form of Order with respect to these matters.

4. Implementation and Notice of Hearing

When the Special Master approves the IHP and community services are in place, ready to receive the resident in accordance with the IHP, the County Administrator shall notify the Pennhurst resident, Commonwealth, parent/guardian and/or certified advocate and Special Master that the IHP will be implemented and the resident will move to the CLA in accordance with the IHP within thirty (30) days. The notice shall be written, and a copy of the IHP shall be attached thereto. This notice shall be delivered in person, or by certified mail, return receipt requested, and shall contain the location and description of the CLA and shall advise all parties how they may make arrangements to visit the CLA, in

the event they have not done so during the planning process. The notice shall provide that the resident,parent/ guardian, or certified advocate may, by written demand delivered to the Hearing Master within seven (7) days of receipt of the notice, demand a hearing to determine whether the living arrangements and services being provided the resident at Pennhurst are more beneficial to the resident's habilitation than the living arrangements and services which have been made ready in the community in accordance with the IHP. In the event the Hearing Master receives no demand for a hearing within the seven (7) day period, the County Administrator shall proceed with the arrangements transferring the resident to the

designated CLA.

5. Hearing

Upon receipt of a demand for a hearing, the Hearing Master shall immediately notify the Pennhurst resident, parent/guardian, certified advocate, the Special Master, County, Commonwealth, and any attorney who may have been retained on behalf of the resident or who may have been provided for the indigent resident by the Commonwealth, of the date for the hearing, which hearing shall commence within ten (10) days of the date on which the hearing demand was received.

The Hearing Master shall have the power to fix the time and place for beginning and closing the hearing, and shall conduct the hearing according to such rules as shall be determined to

be beneficial to the rights and needs of the retarded individual. The Hearing Master may require the production of evidence and rule upon the admissibility of evidence, and shall have the power to put witnesses under oath, and may examine witnesses. A tape recording of each hearing shall be made and preserved for a reasonable time by the Hearing Master.

The Pennhurst resident, parent/guardian, certified advocate, the Special Master, the County and Commonwealth shall have the opportunity to present such evidence as the Hearing Master may determine relevant to the issue of the resident's habilitation. Attendance of witnesses at the hearing may be procured by the issuance and service of subpoenas as provided in Rule

45 of the Federal Rules of Civil Procedure.

The Hearing Master shall make findings and set forth reasons as to whether the living arrangements and services being provided the resident at Pennhurst are more beneficial to the resident's habilitation than the living arrangements and services which have been made ready in the community in accordance with the IHP. In making such finding, the Hearing Master shall be guided by the presumption in favor of placing individuals in CLA's as set forth by the Court of Appeals for the Third Circuit.

Within five (5) days of the completion of the hearing, the Hearing Master shall file with the Clerk of this Court a written report setting forth

findings and reasons as described, above, and shall send copies of the report to all parties to the hearing. The Hearing Master shall, in preparing the report, take such measures as may be necessary for the protection of the retarded person's privacy.

In the event the resident, parent/guardian, certified advocate, Special Master, County or Commonwealth takes exception to the Hearing Master's findings, said exception must be filed with the Court within ten (10) days of the date the Hearing Master's report is filed with the Court.

In the event the Hearing Master determines that the resident should move to the designated CLA, the County Administrator shall proceed with the arrangements transferring the resident

to the CLA. In the event the Hearing Master determines that the living arrangements and services being provided at Pennhurst are more beneficial to the habilitation of the resident than those living arrangements and services which have been made ready in the community in accordance with the IHP, the County Administrator shall terminate the arrangements for transferring the resident to the designated CLA.

6. Provision for Change in Circumstances of Individual

Whenever the Hearing Master has determined that Pennhurst is more beneficial to the habilitation of the resident than the CLA considered by the Hearing Master, in the event the Special Master determines that other living arrangements and services in the

community shall be more beneficial to the resident's habilitation, the Special Master shall direct the County Administrator to reinitiate the planning process in accordance with ¶2.

In the event any former resident of Pennhurst who has moved to a CLA pursuant to this Order is not progressing in accordance with his or her IHP, a review of the IHP and program shall be initiated by the Planning and Assessment Team. Only in the event the Planning and Assessment Team recommends that the resident should be returned to Pennhurst may the County Administrator, subject to the approval of the Special Master, proceed, pursuant to ¶7, to have the resident returned to Pennhurst.

7. Admission to Pennhurst

Except as hereinafter provided,

defendants are hereby enjoined from recommending or in any way counseling that any individual be committed to Pennhurst, and from petitioning for the commitment of any individual to Pennhurst, and from advancing in any way any application for admission to Pennhurst, and are herewith enjoined from participating in any program or activity in connection with the placement in the future or commitment in the future of any retarded person at Pennhurst.

A county defendant shall not recommend the admission of any retarded person to Pennhurst without first having made a written determination setting forth:

(1) The results of an in-depth study of the living arrangements and

services which will be most beneficial to the habilitation of that person;

(2) In the event it is determined that a CLA will not be beneficial to the habilitation of that person, the reasons for such conclusion, together with the efforts which have been made to find an alternative institution for that person in the relevant geographic area; or

(3) In the event it is determined that a CLA will be beneficial to the habilitation of that person but that no appropriate CLA is presently available, the reasons for such conclusion, together with:

(a) the efforts which have been made to provide an appropriate CLA for that person; and

(b) the reasons why this

is an extreme situation requiring admission to Pennhurst until the appropriate CLA is made available.

The County shall notify the Special Master and Hearing Master of such recommendation by delivering to them a copy of the written determination as set forth above. Immediately upon receipt of such document, the Hearing Master shall notify the retarded person, parent/guardian, certified advocate, County, Commonwealth, Special Master, and any attorney who may have been retained on behalf of the retarded person or who may have been provided for the indigent retarded person by the Commonwealth, of a hearing to commence within ten (10) days of said notice. The purpose of the hearing shall be for the Hearing Master to make findings as

to the living arrangements and services which will be most beneficial to the habilitation of that person, and

(1) In the event the Hearing Master determines that a CLA will not be beneficial to the habilitation of the retarded person, the Hearing Master shall determine whether an alternative institution in the relevant geographic area is available. If such institution is available, the County Administrator shall immediately make such arrangements as are provided by state law to admit the person to that institution. If no such institution is available, the County Administrator shall immediately make such arrangements as are provided by state law to admit the person to Pennhurst; or

(2) In the event the

Hearing Master determines that a CLA will be beneficial to the habilitation of the retarded person, the Hearing Master shall determine whether an appropriate CLA is available. If such CLA is available, the County Administrator shall immediately make arrangements to place the person in that CLA. If no such CLA is presently available, the County Administrator shall make such arrangements as the Hearing Master determines are necessary for the person's habilitation until the appropriate CLA is made available.

The retarded person, parent/guardian, certified advocate, County, Commonwealth and Special Master shall have the opportunity to present such evidence as the Hearing Master may determine relevant to the issue of the

retarded person's habilitation. Attendance of witnesses may be procured as provided in ¶5.

The Hearing Master shall have all powers and duties provided in ¶5 and shall prepare a written report setting forth findings and reasons as described, above. In making such findings, the Hearing Master shall be guided by the presumption in favor of placing individuals in CLA's as set forth by the Court of Appeals for the Third Circuit. Within five (5) days of the completion of the hearing, the Hearing Master shall file said report with the Clerk of this Court, sending copies of the report to all parties to the hearing, and shall take such measures in preparing the report as may be necessary for the protection of the retarded person's

privacy.

In the event the retarded person, parent/guardian, certified advocate, County, Commonwealth or Special Master takes exception to the Hearing Master's findings, said exceptions must be filed with the Court within ten (10) days of the date the Hearing Master's report is filed with the Court.

8. Persons on Waiting List

Except as hereinafter provided, defendants are hereby enjoined from recommending, or in any way counseling, that any individual on the waiting list for Pennhurst as of March 17, 1978 be committed to any institution for the retarded operated by the Commonwealth, and from petitioning for the commitment of any such individual to any such

institution, and from advancing in any way any application of any such individual to any such institution, and are herewith enjoined from participating in any program or activity in connection with the placement in the future or commitment in the future of any such individual to any such institution.

A county defendant shall not recommend the admission of any person on the waiting list for Pennhurst to any institution for the retarded operated by the Commonwealth of Pennsylvania without first having prepared an IHP and planned a CLA for that person in accordance with ¶¶ 1 and 2 of the Order of March 17, 1978, as amended herein, and in accordance with the IHP Guidelines. If, after preparing the IHP and planning the CLA in accordance with the Orders of

this Court, the County defendant intends to recommend admission to an institution for the retarded operated by the Commonwealth, said defendant shall prepare a written determination setting forth the following:

(1) In the event it is determined that a CLA will not be beneficial to the habilitation of that person, the reasons for such conclusion.

(2) In the event it is determined that a CLA will be beneficial to the habilitation of that person, but that no appropriate CLA is presently available, the reasons for such conclusion, together with:

(a) the efforts which have been made to provide an appropriate CLA for that person; and

(b) the reasons why this

is an extreme situation requiring admission to an institution until the appropriate CLA is made available.

The County shall notify the Special Master and Hearing Master of such recommendation by delivering to them a copy of the written determination as set forth above. Immediately upon receipt of such document, the Hearing Master shall notify the retarded person, parent/guardian, certified advocate, County, Commonwealth, Special Master, and any attorney who may have been retained on behalf of the retarded person or who may have provided for an indigent retarded person by the Commonwealth, of a hearing to commence within ten (10) days of said notice. The purpose of the hearing shall be for the Hearing Master to make findings as

to the living arrangements and services which will be most beneficial to the habilitation of that person, and

(1) In the event the Hearing Master determines that the institution will be more beneficial to the habilitation of the retarded person than the CLA, the County Administrator shall immediately make such arrangements as are provided by state law to admit the person to that institution.

(2) In the event the Hearing Master determines that the CLA will be more beneficial to the habilitation of the retarded person than the institution, the Hearing Master shall determine whether the appropriate CLA is presently available. If such CLA is available, the County Administrator shall immediately make arrangements to

place the person in that CLA. If no such CLA is presently available, the County Administrator shall make such arrangements as the Hearing Master determines are necessary for the person's habilitation until the appropriate CLA is made available.

The retarded person, parent/guardian, certified advocate, County, Commonwealth and Special Master shall have the opportunity to present such evidence as the Hearing Master may determine relevant to the issue of the retarded person's habilitation. Attendance of witnesses may be procured as provided in ¶5.

The Hearing Master shall have all powers and duties provided in ¶5 and shall prepare a written report setting forth findings and reasons as described

above. In making such findings, the Hearing Master shall be guided by the presumption in favor of placing individuals in CLA's, as set forth by the Court of Appeals for the Third Circuit. Within five (5) days of the completion of the hearing, the Hearing Master shall file said report with the Clerk of this Court, sending copies of the report to all parties to the hearing, and shall take such measures in preparing the report as may be necessary for the protection of the retarded person's privacy.

In the event the retarded person, parent/guardian, certified advocate, County, Commonwealth or Special Master takes exception to the Hearing Master's findings, said exception must be filed with the Court

within ten (10) days of the date the Hearing Master's report is filed with the Court.

AND IT IS SO ORDERED.

(s) RAYMOND J. BRODERICK,

RAYMOND J. BRODERICK, J.

DISTRICT COURT ORDER OF MAY 28, 1980

O R D E R

AND NOW, this 28th day of May, 1980, the Court, having had its attention called to the inadvertent omission of former Pennhurst residents from that portion of its Order of April 24, 1980 concerning admission to institutions for the retarded operated by the Commonwealth of Pennsylvania, hereby ORDERS that the Order of this Court dated April 24, 1980, in connection with "Individual Determinations" is AMENDED by deleting therefrom pararaph 8 and substituting therefore the following:

8. Former Residents of Pennhurst and Persons on Waiting List.

Except as hereinafter provided,

defendants are hereby enjoined from recommending, or in any way counseling, that any individual who was not a resident of Pennhurst on April 24, 1980 but was a resident of Pennhurst at any time from May 30, 1974 to April 24, 1980 or who was on the waiting list for Pennhurst as of March 17, 1978 be committed to any institution for the retarded operated by the Commonwealth, and from petitioning for the commitment of any such individual to any such institution, and from advancing in any way any application of any such individual to any such institution, and are herewith enjoined from participating in any program or activity in connection with the placement in the future or commitment in the future of any such individual to any such institution.

A county defendant shall not

recommend the admission of any person who was not a resident of Pennhurst on April 24, 1980 but was a resident of Pennhurst at any time from May 30, 1974 to April 24, 1980 or who was on the waiting list for Pennhurst as of March 17, 1978 to any institution for the retarded operated by the Commonwealth of Pennsylvania without first having prepared an IHP and planned a CLA for that person in accordance with ¶¶ 1 and 2 of the Order of March 17, 1978, as amended herein, and in accordance with the IHP Guidelines. If, after preparing the IHP and planning the CLA in accordance with the Orders of this Court, the County defendant intends to recommend admission to an institution for the retarded operated by the Commonwealth, said defendant shall prepare a written determination setting

forth the following:

(1) In the event it is determined that a CLA will not be beneficial to the habilitation of that person, the reasons for such conclusion.

(2) In the event it is determined that a CLA will be beneficial to the habilitation of that person, but that no appropriate CLA is presently available, the reasons for such conclusion, together with:

(a) the efforts which have been made to provide an appropriate CLA for that person; and

(b) the reasons why this is an extreme situation requiring admission to an institution until the appropriate CLA is made available.

The County shall notify the Special Master and Hearing Master of

such recommendation by delivering to them a copy of the written determination as set forth above. Immediately upon receipt of such document, the Hearing Master shall notify the retarded person, parent/guardian, certified advocate, County, Commonwealth, Special Master, and any attorney who may have been retained on behalf of the retarded person or who may have provided for an indigent retarded person by the Commonwealth, of a hearing to commence within ten (10) days of said notice. The purpose of the hearing shall be for the Hearing Master to make findings as to the living arrangements and services which will be most beneficial to the habilitation of that person, and

(1) In the event the Hearing Master determines that the institution will be more beneficial to the

habilitation of the retarded person than the CLA, the County Administrator shall immediately make such arrangements as are provided by state law to admit the person to that institution.

(2) In the event the Hearing Master determines that the CLA will be more beneficial to the habilitation of the retarded person than the institution, the Hearing Master shall determine whether the appropriate CLA is presently available. If such CLA is available, the County Administrator shall immediately make arrangements to place the person in that CLA. If no such CLA is presently available, the County Administrator shall make such arrangements as the Hearing Master determines are necessary for the

person's habilitation until the appropriate CLA is made available.

The retarded person, parent/guardian, certified advocate, County, Commonwealth and Special Master shall have the opportunity to present such evidence as the Hearing Master may determine relevant to the issue of the retarded person's habilitation. Attendance of witnesses may be procured as provided in ¶ 5.

The Hearing Master shall have all powers and duties provided in ¶ 5 and shall prepare a written report setting forth findings and reasons as described above. In making such findings, the Hearing Master shall be guided by the presumption in favor of placing individuals in CLA's, as set forth by the Court of Appeals for the Third Circuit. Within five (5) days of

the completion of the hearing, the Hearing Master shall file said report with the Clerk of this Court, sending copies of the report to all parties to the hearing, and shall take such measures in preparing the report as may be necessary for the protection of the retarded person's privacy.

In the event the retarded person, parent/guardian, certified advocate, County, Commonwealth or Special Master takes exception to the Hearing Master's findings, said exception must be filed with the Court within ten (10) days of the date the Hearing Master's report is filed with the Court.

AND IT IS SO ORDERED.

(s) RAYMOND J. BRODERICK,

RAYMOND J. BRODERICK J.

DISTRICT COURT ORDER OF APRIL 1, 1982

MEMORANDUM

BRODERICK, J. April 1st, 1982.

Plaintiffs Terri Lee Halderman, et al. and Plaintiff-Intervenor Pennsylvania Association of Retarded Citizens, et al. (hereinafter "plaintiffs") have filed with this Court motions requesting the deletion of certain portions of this Court's injunctive Order of April 24, 1980. Plaintiffs ask that this Court strike from the Order certain language that has been and may in the future be interpreted as conferring upon the Special Master powers and duties far in excess of those intended by this Court as necessary to carry out the essential function of the Special Master, i.e.,

monitoring compliance with the Court's Orders in this case.

Prior to the filing of the plaintiffs' motions, this Court was of the opinion that its Memorandum of November 18, 1981 had made it abundantly clear that the powers and duties of the Special Master were limited to monitoring compliance with this Court's Orders and that the Court had never intended that the Special Master become involved in supervising the management of Pennhurst and/or community living arrangements.

This Court, on October 19, 1981, conducted a hearing to determine whether certain public statements made by the Secretary of Public Welfare had any basis in fact. The Secretary publicly stated that the Office of the Special Master was duplicating services

performed by the Commonwealth defendants and that the Master's office was "redundant." Based on the evidence presented at the hearing, the Court found that there had been no duplication of services and specifically delineated that the powers and duties of the Special Master were limited to monitoring compliance with the Court's Orders in this case. See Memorandum of November 18, 1981 at 11, 526 F. Supp. at 433. The Court did not at that time, however, remove the words "supervise" and "direct" from its Order of April 24, 1980. To lay to rest once and forever the perennial contention that the Special Master possesses powers over and beyond the designated function of monitoring compliance with this Court's Orders in this case, the Court will at this time grant plaintiffs' motion and

specifically delete the words "plan, organize, direct, supervise and" contained in Section I, paragraph 5, page 3, lines 1-2 of this Court's Order of April 24, 1980. Furthermore, since Section I, Paragraph 6 of the Order of April 24, 1980, pertaining to planning, would appear to be superfluous at this time, the Court will also specifically delete this Paragraph from the Order. In all other respects, this Court's Order of April 24, 1980 remains in full force and effect.

DISTRICT COURT ORDER OF APRIL 1, 1982

O R D E R

AND NOW, this 1st day of April, 1982, upon consideration of plaintiffs' motions to amend this Court's Order of April 24, 1980, for the reasons set forth in this Court's Memorandum of April 1st, 1982,

IT IS HEREBY ORDERED:

1. The words "plan, organize, direct, supervise and" contained in Section I, paragraph 5, page 3, lines 1-2 of this Court's Order of April 24, 1980 are DELETED;

2. Section 1, paragraph 6 of this Court's Order of April 24, 1980 is DELETED.

(s) RAYMOND J. BRODERICK

RAYMOND J. BRODERICK, J.

DISTRICT COURT OPINION OF AUGUST 12, 1982

MEMORANDUM

BRODERICK, J. AUGUST 12 , 1982

The Court's original injunctive Order in this case (Order of March 17, 1978, 446 F. Supp. 1295, 1326) as modified by the order of April 24, 1980, appointed a Special Master to aid in implementing the injunctive relief by submitting plans for procedures to protect the rights of the plaintiff class and to monitor the defendants' compliance with this Court's Orders. The Office of the Special Master has performed these tasks exceptionally well, especially in view of the many instances of non-compliance on the part of the defendant (see, e.g., pp. 14-16,

infra). The Court has determined, however, that the time is approaching when the Office of the Special Master should no longer be required in order to ensure protection for the retarded residents of Pennhurst. For the reasons hereinafter set forth, the Court will therefore enter an order directing that the Office of the Special Master plan to phase out its operations and terminate its activities by December 31, 1982.

History of the Litigation

As is well-known to the litigants, this case began in 1974 as a class action in which the named plaintiffs, retarded persons (the "Pennhurst class") who were either residents of Pennhurst State School and Hospital ("Pennhurst") or on the waiting

list for residence at Pennhurst as of May 30, 1974, claimed injury based on violations of certain state and federal statutes and the United States Constitution in connection with their institutionalization at Pennhurst. This Court, in its findings of fact and conclusions of law (Memorandum of December 23, 1977, 446 F. Supp. 1295) found that the defendants were violating the constitutional and statutory rights of the Pennhurst Class by failing to provide them with minimally adequate habilitation in the least restrictive environment. This holding has been affirmed on two occasions by the United States Court of Appeals for the Third Circuit, sitting en banc. The legal bases for its affirmances were predicated upon federal and state

statutes, and the constitutional violations found by this Court have not as yet been directly addressed by either the Third Circuit or the United States Supreme Court. See pp. 9-13, infra.

On January 6, 1978, this Court held a hearing to determine the injunctive relief necessary to remedy the violations. The parties were asked to attempt to agree on the terms of the Court's order, but no agreement was forthcoming. On March 17, 1978, the Court issued an injunctive Order setting forth the relief to which the retarded residents of Pennhurst were entitled (446 F. Supp. at 1326). The March 17, 1978 Order, inter alia, established the Office of the Special Master. At that time, the Special Master was, for a variety of reasons, essential to

monitoring the relief which would ensure that the Pennhurst residents would receive the minimally adequate habilitation which the Court found had been denied them. At the time the Special Master was appointed by the Court, it was the understanding of the parties as well as the Court that this would be a short-term appointment in that it was contemplated that community living arrangements could be provided for the Pennhurst residents within a few years. It was never envisioned that the Special Master would be necessary for as long as has been the case. See pp. 15-16, infra. However, for the reasons hereinafter set forth, the Court at long last finds that the Office of the Special Master will no longer be necessary for the effective

implementation of the injunctive relief which this Court has ordered for the plaintiff class.

This case, which began in 1974, was tried before the Court, sitting without a jury, over a period of 32 days, ending June 13, 1977. At the trial, all the parties, including the defendants, agreed with the testimony of many experts who testified that Pennhurst was inappropriate and inadequate for habilitation of its mentally retarded residents and that the retarded at Pennhurst were not receiving minimally adequate education, training and care. The defendants did not dispute this finding, but insisted that they wished to accomplish the minimally adequate habilitation by placing the Pennhurst residents in community

facilities pursuant to their own schedule, which the Court found to be vague and indefinite.

The Court found, and the defendants admitted, that Pennhurst, in 1977, did not "meet the minimum standards for the habilitation of its residents." (446 F. Supp. at 1302). The Court also found that Pennhurst was overcrowded and understaffed and without the programs which the experts considered necessary for minimally adequate habilitation. The evidence showed that a large number of Pennhurst residents had actually showed a regression of basic living skills as a result of their confinement at Pennhurst. All parties to the litigation agreed that Pennhurst as an institution was inappropriate and

inadequate for the habilitation of the retarded. (446 F. Supp. at 1304). Programming and training of the retarded Pennhurst residents was found to fall far short of the minimum required for adequate habilitation according to the uncontradicted expert testimony of habilitation professionals. (446 F. Supp. at 1304). Not only was the habilitation then inadequate, but Pennhurst had no plans for improving the programming available to its residents. (446 F. Supp. at 1305).

Furthermore, the evidence presented at trial clearly showed that Pennhurst residents were not only receiving inadequate habilitation but also were regularly subjected to a number of dehumanizing practices. Specifically, this Court found that at

Pennhurst restraints were used as control measures in lieu of adequate staffing. (446 F. Supp. at 1306). The Court further found that psychotropic drugs at Pennhurst were used for control and not for treatment, and the rate of drug use on some of the units at Pennhurst was extraordinarily high. (446 F. Supp. at 1307). Regarding treatment at Pennhurst, the Court found that the environment at Pennhurst was not only not conducive to learning new skills, but it was so poor that it contributed to the loss of skills already learned. (446 F. Supp. at 1308). One survey showed that more than one-third of the Pennhurst residents had "some notation of regression in their records." (446 F. Supp. at 1308, n.40). Pennhurst, at the time of trial,

was in fact a dangerous place to live. "Injuries to residents by other residents and through self-abuse, were common.... In addition, there [was] some staff abuse of residents." (446 F. Supp. at 1308-09). The Court also found that many of the residents suffered physical deterioration and intellectual and behavioral regression during their residency at Pennhurst. (446 F. Supp. at 1309).

Based upon the uncontradicted evidence presented at trial, the Court found that

> Since the Early 1960's there has been a distinct humanistic renaissance, replete with the acceptance of the theory of normalization for the habilitation of the retarded. Mason & Menolascino, supra note 6, at 136. [The Right to Treatment for Mentally Retarded Citizens: An Evolving Legal and Scientific Interface, 10 Creighton L.Rev. 124

(1976)]. The principles of normalization are an outgrowth of studies showing that those in large institutions suffered from apathy, stunted growth and loss in I.Q., and that the smaller the living unit on which the retarded individual lived, the higher the level of behavioral functioning shown by the individual. (Roos, N.T. 1-96 to 1-104). Under the principles of normalization, the retarded individual is treated as much like the non-retarded person as possible. (Id., N.T. 1-106, 1-107). The basic tenet of normalization is that a person responds according to the way he or she is treated. (Glenn, N.T. 5-186, 5-187). The thrust of habilitation through normalization is the remediation of the delayed learning process, so as to develop the maximum growth potential by the acquisition of self-help, language, personal, social, educational, vocational and recreation skills.

Mason & Menolascino, supra note 6, at 139-140. The older theories of habilitating the retarded stressed protecting the individual, and were characterized by little expectation of growth. Given this lack of expectation, the individual rarely exhibited growth. However, once removed from depressing, restrictive routines, the retarded have been able to accomplish a great deal. (Dybwad, N.T. 7-160).

The environment at Pennhurst is not conducive to normalization. It does not reflect society. It is separate and isolated from society and represents group rather than family living. (Hirst, N.T. 7-124). The principles of normalization have been accepted by

the administration of Pennhurst and by the Department of Public Welfare, which is responsible for the administration of programs for the retarded in the five county area (Youngberg, N.T. 22-171; Rice, N.T. 26-43 to 26-45; Bilyew, N.T. 24-13; Hirst, N.T. 7-120), and the current intention of the Department of Public Welfare is to transfer all residents from Pennhurst by the early 1980's. (Rice, N.T. 28-48).

The five county area (Bucks, Chester, Delaware, Montgomery and Philadelphia) has some community facilities providing for the education, training and care of the retarded covering all ages of retardation, including the

profoundly retarded with multiple handicaps. (Girardeau, N.T. 4-140, 4-141). These community facilities have been an outgrowth of the acceptance of the principle of normalization and the rejection of institutions such as Pennhurst in connection with the habilitation of the retarded.

Many individuals now living at Pennhurst could be moved immediately into the community and would be able to cope with little or no supervision. (Settle, N.T. 6-126; Hirst, N.T. 7-116). All the parties in this litigation are in agreement that given appropriate community facilities, all the residents at Pennhurst, even the most profoundly

retarded with multiple handicaps, should be living in the community. (Dybwad, N.T. 7-68).

The primary limiting factor in the transfer of Pennhurst residents to community facilities has been the failure of the Commonwealth and its subdivisions to provide sufficient living units, vocational and day care facilities and other support services at the community level. Since fiscal year 1972, only 186 Pennhurst residents have been transferred from the institution directly into community living units. (Bilyew, N.T. 24-50); although 176 others were transferred from Pennhurst to other institutions during 1974 and 1975. (Clark, N.T.

21-170).

In November, 1970, Act 256 was signed by the Governor of Pennsylvania. This legislation appropriated twenty-one million dollars for the purpose of planning, designing and constructing community facilities which would enable 900 Pennhurst residents to be transferred to the community. In 1971, the McDowell report was prepared at a cost of $68,000. It detailed the programs and services needed to support the 900 Pennhurst residents in the community and provided a blueprint for the implementation of the Act. (Samuels, N.T. 23-9, 23-10, 23-55). Though seven years have passed since

the Act was signed, few of the facilities have become operational. The Department of Public Welfare now expects this program to be completed by 1980. (Id., N.T. 23-44). Over eighteen million dollars of this fund remains unspent but is allocated to building these facilities. (Stipulation, N.T. 7-97). As of April 25, 197, however, only 37 Pennhurst residents have directly benefitted from the Act. (Samuels, N.T. 23-80).

Comparable facilities in the community are generally less expensive than large isolated state institutions. Services can be purchased at regular rates, rather than at rates which must be paid to

attract individuals to work in a setting like Pennhurst. (Conley, N.T. 11-107). The cost of running Pennhurst in 1976 was $27.8 million dollars, or $60 per resident per day. (Id., N.T. 12-28). This does not include the fair rental value of the buildings at Pennhurst (estimated at $3-$4 per resident per day). Id., N.T. 11-114). The statewide cost of community living arrangements in Pennsyvlania for 1976 was $17.64 per individual per day. (PARC Exhibit 63, 64). Program services, which 1/3 of mentally retarded individuals would need, average approximately $10 per individual per day. (Conley, N.T. 11-116, 11-117). Moreover, keeping the retarded individual in the

community makes it possible for him or her to get employment.(Settle, N.T. 7-4). The lifetime earnings of a mildly retarded individual often exceeds $500,000. (Conley, N.T. 12-32). For those with an I.Q. between 25 and 50, 45% of men and 12% of women earn about 20% of the average wage. (Id., N.T. 12-31). When the retarded can work, the amount of financial support which society must provide decreases and the individuals may benefit society with the taxes they pay. Furthermore, the investment per individual at Pennhurst is primarily for warehousing and not for the individual's well-being or future planning, as is the case with community facilities. (Id., N.T.

11-23, 11-24).

(446 F. Supp. at 1311-12 (footnotes omitted))[1] The Court

Footnote

1 The Court's most recent opinion in this case, its Memorandum of June 11, 1982 (_____F. Supp._____) determined, based on the evidence presented at a hearing held in April, 1982, that Pennhurst remains a more expensive means of treating the retarded than community living arrangements. In its Memorandum this Court noted

> [t]he evidence submitted at the April hearing shows that the Commonwealth might save substantial sums of money by complying with the March 2 Order [which requires the Commonwealth defendants to place Pennhurst residents in community living arrangements where community facilities constitute the least restrictive environment for those individuals]. As

> heretofore noted, it costs approximately $36,500 to provide a retarded citizen with transfer to a community living arrangement and habilitation services for one year, and $27,500 for each succeeding year. See Exhibit P-24. According to the evidence presented at the hearing, the per capita cost for each retarded person at Pennhurst is $51,500 per year. Although the Commonwealth defendants are apparently convinced that the per capita costs of providing adequate habilitation in community living arrangements are far less than the per capita costs of providing similar services in institutions, the Commonwealth defendants have nonetheless appeared reluctant through the years to provide community living arrangements for the Pennhurst residents. See Exhibit P-10.
>
> Memorandum of June 11, 1982, at 20.

(End of footnote) also found that the procedure for funding treatment and habilitation of the retarded gave the county defendants a financial incentive -- unrelated to

the relative habilitative benefits -- to place retarded citizens in Pennhurst rather than in appropriate community facilities (446 F. Supp. at 1312-13).

The overwhelming weight of the evidence presented at trial, evidence uncontradicted by the defendants, mandated but one course of injunctive relief -- placing the residents of Pennhurst in the community living arrangements being planned by the Commonwealth and the counties for the habilitation of the retarded (446 F. Supp. at 1325-29). In its first en banc decision in this case, the Third Circuit determined that this Court's original injunctive order had been too broad in that it ordered that all members of the plaintiff class be placed in appropriate community living arrangements and that

Pennhurst eventually be closed. Said the Third Circuit:

> It is probably true, as the trial court found, that in general institutions are less effective than community living arrangements in facilitating the right to habilitation in the least restrictive setting. There is ample testimony on the record indicating the shortcomings of institutions as places for habilitation.
>
> But ... For some patients a transfer from Pennhurst might be too unsettling a move. Long-term patients, for example, may have suffered such degeneration in the minimum skills needed for community living that habilitation outside an institution is a practical impossibility.... We need not decide that issue here. All that we need recognize is that there may be some individual patients who, because of advanced age, profound degree of retardation, special needs or for some other reason, will not be able to adjust to life outside of an institution and thus will be harmed by such a change. The case must therefore be remanded for individual determinations by the court, or by the Special Master, as to the appropriateness of an improved Pennhurst for each such patient.

612 F.2d at 114.

In making these individual determinations, the Third Circuit directed that this Court engage in "a presumption in favor of placing individuals in [community living arrangements]", but "the special needs and desires of individual patients must not be neglected in the process." 612 F.2d at 115. This Court, therefore, in accordance with the Third Circuit's first en banc opinion, entered an order deleting those paragraphs of the March 17, 1978 Order which enjoined admissions to Pennhurst (Order of April 24, 1980). That Order also established a Hearing Master for the purpose of conducting hearings for each Pennhurst resident for whom a community living arrangement has been prepared for the purpose of

determining whether the proposed transfer to the community was "voluntary," as well as for the purpose of determining whether the proposed community living arrangement will be beneficial to his or her habilitation (in particular, whether the proposed community facility will be more beneficial than Pennhurst). When one of the defendants proposes to admit a retarded person to Pennhurst, the Hearing Master holds a hearing for the purpose of determining whether Pennhurst constitutes the least restrictive setting in which that person may receive minimally adequate habilitation. The February 22 Order also set forth the procedure for the initiation and conduct of the aforementioned hearings and established the parameters of the Office

of the Hearing Master. The Order of February 22, 1980 and other revisions in the original injunctive order necessitated by the Third Circuit's opinion were set forth in the comprehensive order of April 24, 1980, which remains the primary and controlling injunctive order in this case. See 673 F.2d 647, 651. In its second en banc opinion in this case, the Third Circuit observed that the United States Supreme Court, in remanding the case to the Circuit:

> found no fault with the district court's findings of fact.. Moreover, the [Supreme] Court did not address those issues respecting scope of relief which are discussed in Part VII of our prior opinion. Thus, assuming the propriety of some legal standard upon which relief could be predicated, there is no occasion, for purposes of this appeal, for a reconsideration of our discussion of the Commonwealth's Eleventh Amendment contention, of objection

> to the definition of the class, of objections to the use of a master, or of other specific objections to provisions of the injunction which we rejected.

673 F.2d at 651. The Hearing Master's role and procedures are described in detail in this Court's order of April 24, 1980 (at pp. 64-73). The "voluntariness" hearings, held to determine whether the retarded person voluntarily wished to be placed in the community living arrangement specified in his or her Individual Habilitation Plan drawn by a planning assessment team of mental retardation professionals, were necessitated by the Supreme Court's Stay Order of June 30, 1980. This Stay Order provided that only voluntary transfers from Pennhurst to the community could be made pending final

disposition of this case. On July 14, 1980, this Court held that the Stay Order did not prevent this Court from ordering "voluntary" transfers from Pennhurst to the community, and directed that the Hearing Master should conduct the aforesaid "voluntariness" hearings in addition to the Hearing Master's duties as set forth in the order of April 24, 1980. On April 20, 1981, the Supreme Court opinion in this case, 451 U.S. 1, reversed the Third Circuit's first en banc opinion and remanded the case to the Court of Appeals for further proceedings. On October 13, 1981, the Commonwealth defendants filed with this Court a motion to discontinue the voluntariness hearings in light of the Supreme Court's decision on the merits. On February 22, 1982, this Court granted

the Commonwealth defendants' motion and directed that the Hearing Master discontinue the voluntariness hearings. See Memorandum of February 26, 1982 at 6-7, 533 F. Supp. 661, 663 ("A review of applicable decisions indicates that a stay order issued by an appellate court terminates upon that court's disposition of the appeal in the absence of an order to the contrary"; Supreme Court Stay granted "pending final disposition" of Supreme Court's review of the case).

On February 26, 1982, pursuant to the Supreme Court's remand, the Third Circuit, again sitting en banc, affirmed this Court's decision and injunctive order as modified in light of the first Court of Appeals decision (673 F.2d 647). In its second opinion, the Third Circuit held that "the district court's

order is supported by the [Pennsylvania Mental Health/Mental Retardation Act] Act of 1966 [50 Pa. Stat. Ann. Tit. 50 §§ 4101-4704 (Purdon 1969)], an independent state law adequate to that end" as interpreted by the Pennsylvania Supreme Court in the case In re Joseph Schmidt, 494 Pa. 86, 429 A.2d 631 (1981) (673 F.2d at 661). The defendants sought certiorari, which was granted by the Supreme Court on June 21, 1982.

The Need for the Special Master

The findings of fact made by this Court, based on the evidence presented at trial, established that the plaintiffs were entitled to such equitable relief as would assure their right to minimally adequate habilitation. It was clear that the appointments of a Special Master and,

later, at the direction of the Third Circuit, a Hearing Master, were essential to providing that relief. For example, the evidence presented at trial concerning the abuses occurring at Pennhurst indicated that an impartial, independent, outside monitor was necessary to ensure that the retarded residents were no longer restrained, drugged, or otherwise physically harmed. Similarly, it was imperative that the community facilities, which all parties agreed were the only viable alternative for providing minimally adequate habilitation to the plaintiff class, be monitored to make certain that they were safe, sanitary, and beneficial to the habilitation of the retarded. The Commonwealth and County defendants, because of their long record

of ignoring the inadequacies of Pennhurst, could not be depended upon to monitor the conditions at Pennhurst and to plan for the minimally adequate habilitation of the Pennhurst class. The Court found that it was necessary to appoint an impartial expert -- the Special Master -- to monitor the implementation of the remedy designed to curtail the violations of the plaintiff's rights. Neither the Commonwealth nor the County defendants ever filed an objection with this Court concerning the appointment of the Special Master. In fact, at no time during the course of this litigation has any defendant requested this Court to alter, reduce, or eliminate the Office of the Special Master. The Commonwealth defendants have never filed a motion

pursuant to Fed. R. Civ. P. 60(b) suggesting that changed circumstances have eliminated the need for the Special Master. The Commonwealth defendants have, however, committed contempt of this Court's Orders by refusing to fund the Office of the Special Master. See Memorandum of August 25, 1981, 533 F. Supp. 631. They appealed this Court's finding of contempt to the Third Circuit, which affirmed this Court's findings and conclusions on February 26, 1982 (673 F.2d 628). In its opinion, the Third Circuit suggested that the Commonwealth defendants could file a Rule 60(b) motion if they felt that changed circumstances had eliminated the need for the Special Master. No such motion has ever been filed with this Court by the Commonwealth defendants or

any other party to this litigation.

As of March, 1978, the defendants had no program to develop individual habilitation plans for the retarded residents of Pennhurst. The defendants also lacked programs for inspecting the community living arrangements to be provided for the Pennhurst residents for whom such community facilities constituted the least restrictive environment in which they could receive minimally adequate habilitation through programs designed by retardation professionals.

For these heretofore discussed reasons, the Court established the office of the Special Master, fully intending that the Special Master's office would be a transitional entity and that the implementation of

the injunctive relief ordered by this Court would ultimately be the responsibility of the defendants. As this Court noted in its Memorandum of November 18, 1981, 526 F. Supp. at 433,

> It has never been the Court's intention that the Office of the Special Master become a permanent and continuous operation. This Court will not be reluctant to reduce the staff of the Special Master's Office whenever it is convinced that the Commonwealth and County defendants are moving with due diligence to effectuate the Court's Orders. As of the October 19th [of 1981] hearing, 870 people remained at Pennhurst. Whenever the Commonwealth and County defendants have provided living arrangements in the community for all Pennhurst residents, this Court would probably have no reason to continue the monitoring functions of the Special Master. Unfortunately, as the record in this case reveals, the defendants have not been diligently carrying out their responsibilities to the Pennhurst residents as required by this Court's Orders. Compliance with this Court's Orders requires a monitor who is not subject to the jurisdiction and control of the defendants.

526 F. Supp. at 434.

The record of compliance with the Court's Orders has not been encouraging. As this Court observed in its Memorandum of March 2, 1981, the defendants, despite the planning and monitoring efforts of the Special Master, were failing to implement the injunctive relief ordered by this Court, which noted that

> despite this Court's orders, and despite the representations by the defendants of their intentions to comply with this Court's Orders, the retarded population of Pennhurst (from March, 1978, the date of the Court's original injunctive order) had been reduced by only 184 to a total of 972, as of the end of August, 1980 -- and not all of that reduction was due to community placements. The school-age residents of Pennhurst, the subject of two specific Court orders, had not been placed in the community by

the extended deadline.

Memorandum of March 2, 1981 at 11. The compliance of the defendants with this Court's orders can for the most part be described as "foot-dragging." Ironically, while the Commonwealth defendants were complaining that they lacked the resources to comply with this Court's Orders, they were, during this very period, transferring the mentally retarded from institutions located elsewhere in the state to community living arrangements. See Memorandum of June 11, 1982 at 20-21,_____ F. Supp._____; Memorandum of March 2, 1981 at 11.

Recently, there have appeared diverse opinions concerning the role of the Special Master in this litigation.

Cf. 612 F.2d at 111-12 Third Circuit (majority opinion) with 101 S.Ct. at 1558-59 (White, J., dissenting); 673 F.2d at 665-70 (Garth, J., dissenting). The varying perceptions are understandable in light of the protracted history of this case. Thus, even at this late stage of the litigation, a full explanation of the functions of the Special Master and the Hearing Master is essential to understanding how recent developments have now made it possible to phase out the Special Master's office.

The Function of the Special Master

From its inception, the Office of the Special Master was charged withthe primary task of monitoring the defendants' compliance with the injunctive relief ordered by the Court.

assurance of a better life.

526 F. Supp. at 423.

Regularly conducted follow-up surveys of the progress of these persons shows that the retarded residents of Pennhurst, when placed in community living arrangements, not only cease to regress, but are showing substantial improvement in their life skills. Most psychologists accept the Adaptive Behavior Scale as a measure of a retarded person's life skills. In Chester County facilities, for example, Pennhurst class members in community living arrangements have increased their Adaptive Behavior Scale score by an average of 15 points (on a 128-point scale). As a whole, the Pennhurst class members receiving habilitation in

residents at Pennhurst. The Pennhurst residents who have been transferred to community living arrangements are receiving minimally adequate habilitation in community living arrangements, a less restrictive environment than that in which they had been confined at Pennhurst. As this Court noted in its Memorandum of September 11, 1981:

> The transfers from Pennhurst to date have in the main provided each of the retarded residents of Pennhurst such minimally adequate habilitation as will give them the opportunity to acquire and maintain such life skills as are necessary for them to cope with life as effectively as their limited capacities will permit. Although a few of the retarded residents of Pennhurst and their families have demonstrated a reluctance to leave the institution, the overwhelming majority are now happy for the freedom to begin a life which offers the

not received any motions from any party in this litigation, suggesting this, the Court has determined that the time has come to phase out the Special Master's office.

The Declining Need for the Special Master

Though this Court has often been dismayed at the slow pace with which its Orders have been carried out, there has been progress. As of March 17, 1978, Pennhurst had a population of 1,156 persons. Assuming that the defendants will be in full compliance with this Court's Order of March 2, 1981, which directs them to have completed the transfer of a specific number of Pennhurst residents prior to September 30, 1982 to community living arrangements, only about 600 retarded persons will remain as

Court on April 1, 1982 entered an Order amending the injunctive language relating to the Office of the Special Master. The purpose of this amendment was to "lay to rest once and forever the perennial contention that the Special Master possesses powers over and beyond the designated function of monitoring compliance with this Court's Orders in this case." (536 F. Supp. at 523).

A reading of the entire record in this case substantiates this Court's finding that the Special Master has always been necessary to effectuate the relief to which the retarded residents of Pennhurst were entitled. However, this Court has, from the outset, intended that the Special Master's role be limited, temporary, and transitional. Although this Court has

January, 1981, the Special Master's Office had a staff of 14 persons and a six-month operating budget of $294,433. The Special Master's Office currently has a staff of six persons and a six-month operating budget of $170,151.

On October 19, 1981, this Court held a hearing to determine whether the Office of the Special Master was duplicating functions performed by the defendants. Based on the evidence presented at that hearing, the Court found that the Special Master had not duplicated and was not duplicating any services being performed by the defendants. See 526 F. Supp. 428 (Memorandum of November 18, 1981). Furthermore, in order to alleviate any misunderstanding concerning the functions of the Special Master, this

Morgan, Special Master and Jennifer L. Howse, Deputy Secretary of Commonwealth Department of Public Welfare). Although this process is not yet complete, (see Dkt. Nos. 1465, 1536, Reports of the Special Master regarding Commonwealth assumption of duties) the Court is optimistic that this transfer of functions will soon be completed. Thus, at this juncture, the Special Master's office continues to monitor the conditions at Pennhurst and is completing the orderly transfer of the individual habilitation plan review and community living arrangement inspection functions. The staff and budget of the Office of the Special Master has decreased significantly (approximately 50 percent) during the past year. In

(see Dkt. No. 1466, Letters of Carla S. plaintiff class are being transferred pursuant to their professionally developed individual habilitation plans arrangements to which the members of the inspecting the community living defendants began to assume the task of On February 1, 1982, the Commonwealth from Jennifer Howse to Carla Morgan). 1467-71 and Letter of December 18, 1981 residents of Pennhurst (see Dkt. Nos. habilitation plans developed for the the task of reviewing the individual Commonwealth defendants began to assume

On January 1, 1982, the pursuant to this Court's Orders.

responsibility of the defendants been and continue to be the they will move. Such decisions have community, when they will move, or where

residents will be moved to the
has never determined which Pennhurst
capacities permit. The Special Master
cope as effectively as his or her
as are necessary to enable him or her to
to acquire and maintain such life skills
them will have a reasonable opportunity
Pennhurst resident in order that each of
professional standards for each
formulated in accordance with
make certain that a plan has been
been limited to monitoring in order to
of the individual habilitation plan has
Special Master's role in the development
and habilitation specialists. The
the retarded client as well as medical
and residential program provides for
joining this team are the day program
of the Pennhurst resident. Frequently
parent, guardian or certified advocate

F. Supp. at 1308). The monitoring function of the Special Master in connection with conditions at Pennhurst has never been considered by this Court or the Special Master as authorizing the Special Master to "run" Pennhurst.

The injunctive relief ordered by this Court (Order and Memorandum of March 17, 1978; Order of March 5, 1979) as modified in light of the Third Circuit's decision (612 F.2d 84) (Order and Memorandum of April 24, 1980) requires that individual habilitation plans be developed for each resident of Pennhurst and other retarded members of the plaintiff class. These proposals are developed by a Planning and Assessment Team (PAT) which includes but is not limited to the Pennhurst resident, the case manager, and the

functions required for daily living (446 their abilities to perform the basic repressed rather than progressed in the retarded living at Pennhurst had dangers. As this Court found in 1977, exposing residents to unnecessary unsanitary living conditions; (b) residents in supine positions; (d) habilitation; (f) force-feeding of convenience; (e) inadequate programs for administration of drugs for staff superfluous and dangerous drugs; (g) the physical restraints; (c) use of confinement; (b) unregulated use of punishment of the residents by solitary the Court found to exist were: (a) were corrected. Among the abuses which this Court found to exist at Pennhurst in order to make certain that the abuses monitoring function has been essential

member of the class in order to ensure that the plan for each of the retarded residents provide for such minimal care and services as would enable them to cope with life as effectively as their capacities permit. This function of the Special Master was essential in light of the Court's finding that individual habilitation plans had not been prepared for the Pennhurst residents. The orders of this Court require the defendants to provide an individual habilitation plan for each retarded resident of Pennhurst in order to make certain that each receives such minimal care and services as will be beneficial to his or her habilitation.

The third primary function of the Special Master was and is to monitor conditions at Pennhurst. This

Special Master to make certain that the poor sanitation, the dangers to life and limb, and the lack of training programs which this Court found to exist at Pennhurst are not duplicated on a smaller scale in community living arrangements. This function of the Special Master was particularly necessary in that the defendants had been operating without rules, regulations or policies designed to make certain that the community living arrangements for the retarded are safe and sanitary, and that the programs and services necessary for minimally adequate habilitation were being provided.

Another primary function of the Special Master was to review individual habilitation plans for each retarded

In particular, it is the function of the beneficial to his or her habilitation. any community facility that is not of the plaintiff class be transferred to that no Pennhurst resident or any member Court has always been vitally concerned beneficial to their habilitation. The facilities that were safe, sanitary, and residents were transferred to community purpose of assuring that the Pennhurst Special Master was essential for the transferred. This function of the Pennhurst residents were being community living arrangements to which Master was to regularly monitor the One primary task of the Special community living arrangement.

master to operate Pennhurst or any intended as authorizing the Special orders of the Court and was never

All the activities of the Special Master were necessary to assure compliance with the Court's Orders.

The Court's original relief order (Order of March 17, 1978) and subsequent relief orders (see, e.g., Order of March 5, 1979) have specifically directed the defendants to provide the relief to which this Court found the plaintiff penthurst residents entitled to receive under the Constitution of the United States, as well as state and federal statutes. The Special Master was appointed with "the power and duty to plan, organize, direct, supervise and monitor the implementation of ... Orders of the Court." (Orders of March 17, 1978 and April 24, 1980). This grant of authority is specifically limited to the

QUESTIONS PRESENTED

1. Where a federal court exercises pendent jurisdiction over a state law claim, in the context of federal constitutional and state-created liberty interests, and where the state law issue is definitively determined by the state legislature and state supreme court, should this Court grant certiorari although a) the outcome of the case could not be altered by even a successful Eleventh Amendment assertion, b) there is no conflict among the lower courts and c) an asserted Eleventh Amendment claim is contrary to decided cases in this Court and has no merit?

2. Where petitioners pose on certiorari a question of federal-state comity and where that issue was not raised or briefed in the Court of Appeals and not decided by the Court of Appeals, and where -- on prior certiorari petition -- the question was not presented here, should this Court grant certiorari although there is no conflict among the lower courts and the issue is clear?

3. Where, after the decision of the Court of Appeals sought to be reviewed here, the District Court amended its orders and struck from them assertedly objectionable authority for a "master", should certiorari be granted to review the non-existent prior order?

No. 81 - 2101

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

PENNHURST STATE SCHOOL AND HOSPITAL, et al.,

Petitioners

v.

TERRI LEE HALDERMAN, et al.,

Respondents

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

BRIEF IN OPPOSITION
FOR RESPONDENTS
TERRI LEE HALDERMAN, ET AL.

David Ferleger, Esquire *
Penelope A. Boyd, Esquire

37 South 20th Street
Suite 601
Philadelphia, Pa. 19103

Counsel for Respondents

* Counsel of record

May 26, 1982